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Selected Materials on the Twenty-Fifth Amendment, Senate Document No. 93-42.

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SELECTED MATERIALS ON
THE TWENTY-FIFTH AMENDMENT

REPORT OF
CONSTITUTIONAL AMENDMENTS SUBCOMMITTEE

BY

SENATOR BIRCH BAYH, *Chairman*

TO THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE



OCTOBER 1973

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PREFACE

Eight years ago, on July 6, 1965, the Congress approved and proposed to the States the Twenty-fifth Amendment to the Constitution. A year and a half later, on February 23, 1967, it was ratified by the necessary three-fourths of the States. The Amendment sought to clarify the ambiguity of Article II, Section 1 of the Constitution as to Presidential disability and to provide for the first time a procedure for filling a vacancy in the office of the Vice-President.

Recent events have caused numerous questions to be raised about the operations of the Amendment, and a large number of inquiries on this subject have been directed to the Subcommittee on Constitutional Amendments. Because many of the Senate and House documents relating to the Amendment are out-of-print and because there appears to be a clear need to collect together in one place various other materials on the Amendment, I have asked the Senate to print as a Senate Document the following compilation of Congressional documents, law review articles and legal memoranda.

BIRCH BAYH,
*Chairman, Subcommittee on Constitutional Amendments,
Senate Committee on the Judiciary.*

PRESIDENTIAL INABILITY AND VACANCIES IN THE
OFFICE OF THE VICE PRESIDENT

AUGUST 13, 1964.—Ordered to be printed

Mr. BAYH, from the Committee on the Judiciary, submitted the
following

REPORT
together with
INDIVIDUAL VIEWS
[To accompany S. J. Res. 139]

The Committee on the Judiciary, to which was referred the resolution (S.J. Res. 139), proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office, having considered the same, reports favorably thereon, with amendments, and recommends that the resolution, as amended, do pass.

AMENDMENTS

On page 1, line 7, following the word "States" strike the colon and add the following:

within seven years from the date of its submission by the Congress:

Strike all of SEC. 1, SEC. 2, SEC. 3, SEC. 4, SEC. 5, SEC. 6, and SEC. 7 and insert in lieu thereof the following:

Article —

SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SEC. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SEC. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

SEC. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

SEC. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.

PURPOSE OF THE AMENDMENTS

To substitute perfecting language that was acquired by the reception of testimony from expert witnesses in the field of constitutional law and from discussion of the problem by members of the subcommittee.

PURPOSE

The purpose of the proposed Senate joint resolution is to provide for continuity in the office of the Chief Executive in the event that the President becomes unable to exercise the powers and duties of the Office, and further, to provide for the filling of vacancies in the Office of the Vice President whenever such vacancies occur.

STATEMENT

The constitutional provisions

The Constitution of the United States, in article II, section 1, clause 5, contains provisions relating to the continuity of the executive power at times of death, resignation, inability, or removal of a President. No replacement provision is made in the Constitution where a vacancy occurs in the Office of the Vice President. Article II, section 1, clause 5 reads as follows:

In Case of the Removal of the President from Office, or at his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide

for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

This is the language of the Constitution as it was adopted by the Constitutional Convention upon recommendation of the Committee on Style. When this portion of the Constitution was submitted to that Committee it read as follows:

In case of his (the President's) removal as aforesaid, death, absence, resignation, or inability to discharge the powers of duties of his office, the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.

The Legislature may declare by law what officer of the United States shall act as President, in case of the death, resignation, or disability of the President and Vice President; and such officer shall act accordingly, until such disability be removed, or a President shall be elected.

While the Committee on Style was given no authority to change the substance of prior determinations of the Convention, it is clear that this portion of the draft which that Committee ultimately submitted was a considerable alteration of the proposal which the Committee had received.

The inability clause and the Tyler precedent

The records of the Constitutional Convention do not contain any explicit interpretation of the provisions as they relate to inability. As a matter of fact, the records of the Convention contain only one apparent reference to the aspects of this clause which deal with the question of disability. It was Mr. John Dickinson, of Delaware, who, on August 27, 1787, asked:

What is the extent of the term "disability" and who is to be the judge of it? (Farrand, "Records of the Constitutional Convention of 1787," vol. 2, p. 427.)

The question is not answered so far as the records of the Convention disclose.

It was not until 1841 that this clause of the Constitution was called into question by the occurrence of one of the listed contingencies. In that year President William Henry Harrison died, and Vice President John Tyler faced the determination as to whether, under this provision of the Constitution, he must serve as Acting President or whether he became the President of the United States. Vice President Tyler gave answer by taking the oath as President of the United States. While this evoked some protest at the time, noticeably that of Senator William Allen, of Ohio, the Vice President (Tyler) was later recognized by both Houses of Congress as President of the United States (Congressional Globe, 27th Cong., 1st sess., vol. 10, pp. 3-5, May 31-June 1, 1841).

This precedent of John Tyler has since been confirmed on seven occasions when Vice Presidents have succeeded to the Presidency of the United States by virtue of the death of the incumbent President. Vice Presidents Fillmore, Johnson, Arthur, Theodore Roosevelt,

Coolidge, Truman, and Lyndon Johnson all have become President in this manner.

The acts of these Vice Presidents, and the acquiescence in, or confirmation of, their acts by Congress have served to establish a precedent that, in one of the contingencies under article II, section 1, clause 5, that of death, the Vice President becomes President of the United States.

The clause which provides for succession in case of death also applies to succession in case of resignation, removal from office, or inability. In all four contingencies, the Constitution states: "the same shall devolve on the Vice President."

Thus it is said that whatever devolves upon the Vice President upon death of the President, likewise devolves upon him by reason of the resignation, inability, or removal from office of the President. (Theodore Dwight, "Presidential Inability, North American Review," vol. 133, p. 442 (1919)).

The Tyler precedent, therefore, has served to cause doubt on the ability of an incapacitated President to resume the functions of his office upon recovery. Professor Dwight, who later became president of Yale University, found further basis for this argument in the fact that the Constitution, while causing either the office, or the power and duties of the office, to "devolve" upon the Vice-President, is silent on the return of the office or its functions to the President upon recovery. Where both the President and Vice President are incapable of serving, the Constitution grants Congress the power to declare what officer shall act as President "until the disability is removed."

These considerations apparently moved persons such as Daniel Webster, who was Secretary of State when Tyler took office as President, to declare that the powers of the office are inseparable from the office itself and that a recovered President could not displace a Vice President who had assumed the prerogatives of the Presidency. This interpretation gains support by implication from the language of article I, section 3, clause 5 of the Constitution which provides that:

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the *office* of President of the United States. [*Italic supplied.*]

The doubt engendered by precedent was so strong that on two occasions in the history of the United States it has contributed materially to the failure of Vice Presidents to assume the office of President at a time when a President was disabled. The first of these occasions arose in 1881 when President Garfield fell victim of an assassin's bullet. President Garfield lingered for some 80 days during which he performed but one official act, the signing of an extradition paper. There is little doubt but that there were pressing issues before the executive department at that time which required the attention of a Chief Executive. Commissions were to be issued to officers of the United States. The foreign relations of this Nation required attention. There was evidence of mail frauds involving officials of the Federal Government. Yet only such business as could be disposed of by the heads of Government departments, without Presidential supervision, was handled. Vice President Arthur did not act. Respected legal opinion of the day was divided upon the ability of the President to resume the duties of his office should he recover. (See opinions of

Lyman Trumbull, Judge Thomas Cooley, Benjamin Butler and Prof. Theodore Dwight, "Presidential Inability, North American Review," vol. 133, pp. 417-446 (1881).)

The division of legal authority on this question apparently extended to the Cabinet, for newspapers of that day, notably the New York Herald, the New York Tribune, and the New York Times contain accounts stating that the Cabinet considered the question of the advisability of the Vice President acting during the period of the President's incapacity. Four of the seven Cabinet members were said to be of the opinion that there could be no temporary devolution of Presidential power on the Vice President. This group reportedly included the then Attorney General of the United States, Mr. Wayne MacVeagh. All of Garfield's Cabinet were of the view that it would be desirable for the Vice President to act but since they could not agree upon the ability of the President to resume his office upon recovery, and because the President's condition prevented them from presenting the issue to him directly the matter was dropped.

It was not until President Woodrow Wilson suffered a severe stroke in 1919 that the matter became one of pressing urgency again. This damage to President Wilson's health came at a time when the struggle concerning the position of the United States in the League of Nations was at its height. Major matters of foreign policy such as the Shantung Settlement were unresolved. The British Ambassador spent 4 months in Washington without being received by the President. Twenty-eight acts of Congress became law without the President's signature (Lindsay Rogers, "Presidential Inability, the Review," May 8, 1920; reprinted in 1958 hearings before Senate Subcommittee on Constitutional Amendments, pp. 232-235). The President's wife and a group of White House associates acted as a screening board on decisions which could be submitted to the President without impairment of his health. (See Edith Bolling Wilson, "My Memoirs," pp. 288-290; Hoover, "Forty-two Years in the White House," pp. 105-106; Tumulty, "Woodrow Wilson as I Know Him," pp. 437-438.)

As in 1881, the Cabinet considered the advisability of asking the Vice President to act as President. This time, there was considerable opposition to the adoption of such procedure on the part of assistants of the President. It has been reported by a Presidential secretary of that day that he reproached the Secretary of State for suggesting such a possibility (Joseph P. Tumulty, "Woodrow Wilson as I Know Him," pp. 443-444). Upon the President's ultimate recovery, the President caused the displacement of the Secretary of State for reasons of alleged disloyalty to the President (Tumulty, "Woodrow Wilson as I Know Him," pp. 444-445).

On three occasions during the Eisenhower administration, incidents involving the physical health of the President served to focus attention on the inability clause.

President Eisenhower became concerned about the gap in the Constitution relative to Presidential inability, and he attempted to reduce the hazards by means of an informal agreement with Vice President Nixon. The agreement provided:

1. In the event of inability the President would, if possible, so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.

2. In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the office and would serve as Acting President until the inability had ended.

3. The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.

President Kennedy entered into a similar agreement with Vice President Johnson as has President Johnson with Speaker John McCormack. Such informal agreements cannot be considered an adequate solution to the problem because: (A) Their operation would differ according to the relationship between the particular holders of the offices; (B) a private agreement cannot give the Vice President clear authority to discharge powers conferred on the President by the Constitution, treaties, or statutes; (C) no provision is made for the situation in which a dispute exists over whether or not the President is disabled. Former Attorneys General Brownell and Rogers as well as Attorney General Kennedy agree that the only definitive method to settle the problem is by means of a constitutional amendment.

THE NEED FOR CHANGE

The historical review of the interpretation of article II, section 1, clause 5, suggests the difficulties which it has already presented. The language of the clause is unclear, its application uncertain. The clause couples the contingencies of a permanent nature such as death, resignation, or removal from office, with inability, a contingency which may be temporary. It does not clearly commit the determination of inability to any individual or group, nor does it define inability so that the existence of such a status may be open and notorious. It leaves uncertain the capacity in which the Vice President acts during a period of inability of the President. It fails to define the period during which the Vice President serves. It does not specify that a recovered President may regain the prerogatives of his office if he has relinquished them. It fails to provide any mechanism for determining whether a President has in fact recovered from his inability, nor does it indicate how a President, who sought to recover his prerogatives while still disabled, might be prevented from doing so.

The resolution of these issues is imperative if continuity of Executive power is to be preserved with a minimum of turbulence at times when a President is disabled. Continuity of executive authority is more important today than ever before. The concern which has been manifested on previous occasions when a President was disabled, is increased when the disability problem is weighed in the light of the increased importance of the Office of the Presidency to the United States and to the world.

This increased concern has in turn manifested an intensified examination of the adequacy of the provisions relating to the orderly transfer of the functions of the Presidency. Such an examination is not reassuring. The constitutional provision has not been utilized because its procedures have not been clear. After 175 years of experience

with the Constitution the inability clause remains an untested provision of uncertain application.

METHOD OF CHANGE

In previous instances in history when this question has arisen, one of the major considerations has been whether Congress could constitutionally proceed to resolve the problem by statute, or whether an enabling constitutional amendment would be necessary. As early as 1920, when the Committee on the Judiciary of the House of Representatives, 66th Congress, 2d session, considered the problem, Representatives Madden, Rogers, and McArthur took the position that the matter of disability could be dealt with by statute without an amendment to the Constitution, whereas Representative Fess was of the opinion that Congress was not authorized to act under the Constitution, and that an amendment would first have to be adopted (hearings before the Committee on the Judiciary, House of Representatives, February 26 and March 1, 1920). Through the years, this controversy has increased in intensity among Congressmen and constitutional scholars who have considered the presidential inability problem.

Those who feel that Congress does not have the authority to resolve the matter by statute claim that the Constitution does not support a reasonable inference that Congress is empowered to legislate. They point out that article II, section 1, clause 5 of the Constitution authorized Congress to provide by statute for the case where both the President and Vice President are incapable of serving. By implication, Congress does not have the authority to legislate with regard to the situation which concerns only a disabled President, with the Vice President succeeding to his powers and duties. Apparently this is the proper construction, because the first statute dealing with Presidential succession under article II, section 1, clause 6, which was enacted by contemporaries of the framers of the Constitution, did not purport to establish succession in instances where the President alone was disabled (act of March 1, 1792, 1 Stat. 239).

Serious doubts have also been raised as to whether the "necessary and proper" authority of article I, section 8, clause 18, gives the Congress the power to legislate in this situation. The Constitution does not vest any department or office with the power to determine inability, or to decide the term during which the Vice President shall act, or to determine whether and at what time the President may later regain his prerogatives upon recovery. Thus it is difficult to argue that article I, section 8, clause 18 gives the Congress the authority to make all laws which shall be necessary and proper for carrying out such powers.

In recent years, there seems to have been a strong shift of opinion in favor of the proposition that a constitutional amendment is necessary, and that a mere statute would not be adequate to solve the problem. The last three Attorneys General who have testified on the matter, Herbert Brownell, William P. Rogers, and Deputy Attorney General Nicholas deB. Katzenbach, have agreed an amendment is necessary. In addition to the American Bar Association and the American Association of Law Schools, the following organizations have agreed an amendment is necessary: the State bar associations of Arizona, Arkansas, California, Colorado, Connecticut, Hawaii,

Indiana, Iowa, Kansas, Louisiana, Michigan, Ohio, Rhode Island, Texas, Virginia, Vermont; and the bar associations of Denver, Colo.; the District of Columbia; Dade County, Fla.; city of New York; Passaic County, N.J.; Greensboro, N.C.; York County, Pa.; and Milwaukee, Wis.

The most persuasive argument in favor of amending the Constitution is that so many legal questions have been raised about the authority of Congress to act on this subject without an amendment that any statute on the subject would be open to criticism and challenge at the most critical time—that is, either when a President had become disabled, or when a President sought to recover his office. Under these circumstances, there is an urgent need to adopt an amendment which would distinctly enumerate the proceedings for determination of the commencement and termination of disability.

Filling of vacancies in the Office of the President

While the records of the Constitutional Convention disclosed little insight on the framers' interpretation of the inability provisions of the Constitution, they do reveal that wide disagreement prevailed concerning whether or not a Vice President was needed. If he was needed, what were to be his official duties, if any.

The creation of the office of Vice President came in the closing days of the Constitutional Convention. Although such a position was considered very early in the Convention, later proposals envisaged the President of the Senate, the Chief Justice and even a council of advisers, as persons who would direct the executive branch should a lapse of Executive authority come to pass.

On September 4, 1787, a Committee of Eleven, selected to deliberate those portions of the Constitution which had been postponed, recommended that an office of Vice President be created and that he be elected with the President by an electoral college. On September 7, 1787, the Convention discussed the Vice-Presidency and the duties to be performed by the occupant of the office. Although much deliberation ensued regarding the official functions of the office, little thought seems to have been given to the succession of the Vice President to the office of President in case of the death of the President.

A committee, designated to revise the style of and arrange the articles agreed to by the House, returned to Convention on September 12, 1787, a draft which for all practical purposes was to become the Constitution of the United States. It contemplated two official duties for the Vice President: (1) to preside over the Senate, in which capacity he would vote when the Senate was "equally divided" and open the certificates listing the votes of the presidential electors, and (2) to discharge the powers and duties of the President in case of his death, resignation, removal, or inability.

While the Constitution does not address itself in all cases to specifics regarding the Vice President as was the case for the President, the importance of the office in view of the Convention is made apparent by article II, section 1, clause 3. This clause, the original provision for the election of the President and the Vice President, made it clear that it was designed to insure that the Vice President was a person equal in stature to the President.

The intent of the Convention, however, was totally frustrated when the electors began to distinguish between the two votes which article II, section 1, clause 3 had bestowed upon them. This inherent defect

was made painfully apparent in the famous Jefferson-Burr election contest of 1800, and in 1804 the 12th amendment modified the college voting to prevent a reoccurrence of similar circumstances.

There is little doubt the 12th amendment removed a serious defect from the Constitution. However, its passage, coupled with the growing political practice of nominating Vice Presidents to appease disappointed factions of the parties, began a decline that was in ensuing years to mold the Vice Presidency into an office of inferiority and disparagement.

Fortunately, this century saw a gradual resurgence of the importance of the Vice-Presidency. He has become a regular member of the Cabinet, Chairman of the National Aeronautics and Space Council, Chairman of the President's Committee on Equal Employment Opportunities, a member of the National Security Council, and a personal envoy for the President. He has in the eyes of Government regained much of the "equal stature" which the framers of the Constitution contemplated he should entertain.

THE NEED FOR CHANGE

The death of President Kennedy and the accession of President Johnson has pointed up once again the abyss which exists in the executive branch when there is no incumbent Vice President. Sixteen times the United States of America has been without a Vice President, totaling 37 years during our history.

As has been pointed out, the Constitutional Convention in its wisdom foresaw the need to have a qualified and able occupant of the Vice President's office should the President die. They did not, however, provide the mechanics whereby a Vice Presidential vacancy could be filled.

The considerations which enter into a determination of whether provisions for filling the office of Vice President when it becomes vacant should be made by simple legislation or require a constitutional amendment are similar to those which enter into the same kind of determination about Presidential inability provisions. In both cases, there is some opinion that Congress has authority to act. However the arguments that an amendment is necessary are strong and supported by many individuals. We must not gamble with the constitutional legitimacy of our Nation's executive branch. When a President or a Vice President of the United States assumes his office, the entire Nation and the world must know without doubt that he does so as a matter of right. Only a constitutional amendment can supply the necessary air of legitimacy.

The argument that Congress can designate a Vice President by law is at best a weak one. The power of Congress in this regard is measured principally by article II, section 1, clause 6 which states that—

the Congress may by law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the Disability be removed, or a President shall be elected.

This is not in specific terms a power to declare what officer shall be Vice President. It is a power to declare upon what officer the duties

and powers of the office of President shall devolve when there is neither President nor Vice President to act.

To stand by ready for the powers and duties of the Presidential office to devolve upon him at the time of death or inability of the President, is the principal constitutional function of the Vice President. It is clear that Congress can designate the officer who is to perform that function when the office of Vice President is vacant. Indeed it has done so in each of the Presidential Succession Acts. Should there be any more objection to designating that officer Vice President than there is to designating as President the Vice President upon whom devolve the powers and duties of a deceased President, for which designation there is no specific constitutional authorization?

The answer to that question is "Yes." The Constitution has given the Vice President another duty and sets forth specific instructions as to who is to perform it in his absence. Article I, section 2, clause 4 provides that the Vice President shall be the President of the Senate and clause 5 provides that the Senate shall choose its other officers, including a "President pro Tempore, in the Absence of the Vice President or when he shall exercise the Office of the President of the United States." It is very difficult to argue that a person designated Vice President by Congress, or selected in any way other than by the procedures outlined in amendments 12 and 22 can be, the President of the Senate.

One of the principal reasons for filling the Office of Vice President when it becomes vacant is to permit the person next in line to become familiar with the problems he will face should he be called upon to act as President, e.g., to serve on the National Security Council, head the President's Committee on Equal Employment Opportunity, participate in Cabinet meetings and take part in other top-level discussions which lead to national policymaking decisions. Those who consider a law sufficient to provide for filling a Vice Presidential vacancy point out that the Constitution says nothing about such duties and there is therefore nothing to prevent Congress from assigning these duties to the officer it designates as next in line in whatever Presidential succession law it enacts. Regardless of what office he held at the time of his designation as Vice President, however, he would have a difficult time carrying out the duties of both offices at the same time.

When, to all these weaknesses, one adds the fact that no matter what laws Congress may write describing the duties of the officer it designates to act as Vice President, the extent to which the President takes him into his confidence or shares with him the deliberations leading to executive decisions is to be determined largely by the President rather than by statute, practical necessity would seem to require not only that the procedure for determining who fills the Vice-Presidency when it becomes vacant be established by constitutional amendment but that the President be given an active role in the procedure whatever it be.

Finally, as in the case of inability, the most persuasive argument in favor of amending the Constitution is the division of authority concerning the authority of Congress to act on this subject. With this division in existence it would seem that any statute on the subject would be open to criticism and challenge at a time when absolute legitimacy was needed.

ANALYSIS

Inability

The proposal now being submitted is cast in the form of a constitutional amendment for the reasons which have been outlined earlier.

Article II, section 1, clause 5 of the Constitution is unclear on two important points. The first is whether the "office" of the President or the "powers and duties of the said office" devolve upon the Vice President in the event of Presidential inability. The second is who has the authority to determine what inability is, when it commences, and when it terminates. Senate Joint Resolution 139 resolves both questions.

The first section would affirm the historical practice by which a Vice President has become President upon the death of the President, further extending the practice to the contingencies of resignation or removal from office. It separates the provisions relating to inability from those relating to death, resignation, or removal, thereby eliminating any ambiguity in the language of the present provision in article II, section 1, clause 5.

Sections 3, 4, and 5 embrace the procedures for determining the commencement and termination of Presidential inability.

Section 3 lends constitutional authority to the practice that has heretofore been carried out by informal agreements between the President and the person next in the line of succession. It makes clear that the President may declare in writing his disability and that upon such an occurrence the Vice President becomes Acting President. By establishing the title of Acting President the proposal makes clear that it is not the "office" but the "powers and duties of the office" that devolve on the Vice President and further clarifies the status of the Vice President during the period when he is discharging the powers and duties of a disabled President.

Section 4 is the first step, of two, that embraces the most difficult problem of inability—the factual determination of whether or not inability exists. Under this section, if a President does not declare that an inability exists, the Vice President, if satisfied that the President is disabled shall, with the written approval of a majority of the heads of the executive departments, assume the discharge of the powers and duties of the Office as Acting President upon the transmission of such declaration to the Congress.

The final success of any constitutional arrangement to secure continuity in cases of inability must depend upon public opinion and their possession of a sense of "constitutional morality." Without such a feeling of responsibility there can be no absolute guarantee against usurpation. No mechanical or procedural solution will provide a complete answer if one assumes hypothetical cases in which most of the parties are rogues and in which no popular sense of constitutional propriety exists. It seems necessary that an attitude be adopted that presumes we shall always be dealing with "reasonable men" at the highest governmental level. The combination of the judgment of the Vice President and a majority of the Cabinet members appears to furnish the most feasible formula without upsetting the fundamental checks and balances between the executive, legislative, and judicial branches. It would enable prompt action by the persons closest to the President, both politically and physically, and presumably most

familiar with his condition. It is assumed that such decision would be made only after adequate consultation with medical experts who were intricately familiar with the President's physical and mental condition.

There are many distinguished advocates for a specially constituted group in the nature of a factfinding body to determine presidential inability rather than the Cabinet. However, such a group would face many dilemmas. If the President is so incapacitated that he cannot declare his own inability the factual determination of inability would be relatively simple. No need would exist for a special factfinding body. Nor is a factfinding body necessary if the President can and does declare his own inability. If, however, the President and those around him differ as to whether he does suffer from an inability which he is unwilling to admit, then a critical dispute exists. But this dispute should not be determined by a special commission composed of persons outside the executive branch. Such a commission runs a good chance of coming out with a split decision. What would be the effect, for example, if a commission of seven voted 4 to 3 that the President was fit and able to perform his Office? What power could he exert during the rest of his term when, by common knowledge, a change of one vote in the commission proceedings could yet deny him the right to exercise the powers of his Office? If the vote were the other way and the Vice President were installed as Acting President, what powers could he exert when everyone would know that one vote the other way could cause his summary removal from the exercise of Presidential powers? If the man acting as President were placed in this awkward, completely untenable and impotent position, the effect on domestic affairs would be bad enough; the effect on the international position of the United States might well be catastrophic.

However, in the interest of providing flexibility for the future, the amendment would authorize the Congress to designate a different body if this were deemed desirable in light of subsequent experience.

Section 5 of the proposed amendment would permit the President to resume the powers and duties of the office upon his transmission to the Congress of his written declaration that no inability existed. However, should the Vice President and a majority of the heads of the executive departments feel that the President is unable, then they could prevent the President from resuming the powers and duties of the office by transmitting their written declaration so stating to the Congress within 2 days. Once the declaration of the President stating no inability exists and the declaration of the Vice President and a majority of the heads of the executive departments stating that inability exists, have been transmitted to the Congress, then the issue is squarely joined. At this point the proposal recommends that the Congress shall make the final determination on the existence of inability. If the Congress determines by a two-thirds vote of both Houses that the President is unable, then the Vice President continues as Acting President. However, should the Congress fail in any manner to cast a vote of two-thirds or more in both Houses supporting the position that the President was unable to perform the powers and duties of his office, then the President would resume the powers and duties of the office. The recommendation for a vote of two-thirds is in conformity with the provision of article I, section 3, clause 6 of the Constitution relating to impeachments.

This proposal achieves the goal of an immediate original transfer in Executive authority and the resumption of it in consonance both with the original intent of the framers of the Constitution and with the balance of powers among the three branches of our Government which is the permanent strength of the Constitution.

Vacancies

Section 2 is intended to virtually assure us that the Nation will always possess a Vice President. It would require a President to nominate a person to be Vice President whenever a vacancy occurred in that Office. The nominee would take office as Vice President once he had been confirmed by a majority vote in both Houses of the Congress.

In considering this section of the proposal, it was observed that the office of the Vice President has become one of the most important positions in our country. The days are long past when it was largely honorary and of little importance, as has been previously pointed out. For more than a decade the Vice President has borne specific and important responsibilities in the executive branch of Government. He has come to share and participate in the executive functioning of our Government, so that in the event of tragedy, there would be no break in the informed exercise of executive authority. Never has this been more adequately exemplified than by the recent uninterrupted assumption of the Presidency by Lyndon B. Johnson.

It is without contest that the procedure for the selection of a Vice President must contemplate the assurance of a person who is compatible with the President. The importance of this compatibility is recognized in the modern practice of both major political parties in according the presidential candidate a voice in choosing his running mate subject to convention approval. This proposal would permit the President to choose his Vice President subject to congressional approval. In this way the country would be assured of a Vice President of the same political party as the President, someone who would presumably work in harmony with the basic policies of the President.

CONCLUSION

This amendment seeks to remove a vexatious constitutional problem from the realm of national concern. It concisely clarifies the ambiguities of the present provision in the Constitution. In so doing, it recognizes the vast importance of the office involved, and the necessity to maintain continuity of the Executive power of the United States.

The Subcommittee on Constitutional Amendments approved this proposal after hearing testimony and receiving written statements from many distinguished students on the subject. The subcommittee also had the benefit of considerable study reflected in congressional documents previously published on this subject. In the light of all this material and evidence, the committee believes that a serious constitutional gap exists with regard to Presidential inability and vacancies in the office of the Vice President, and that the proposal which is now presented is the best solution to the problem.

RECOMMENDATION

The committee, after considering the several proposals now pending before it relating to the matter of Presidential inability, reports favorably on Senate Joint Resolution 139, with amendments, and recommends its submission to the legislatures of the several States of the United States so that it may become a part of the Constitution of the United States.

INDIVIDUAL VIEWS OF MR. HRUSKA

The problem of Presidential inability and succession has long been neglected and ignored. It is for this reason that I welcome the opportunity to consider the joint resolution now presented to the Senate.

In the opinion of most legal scholars and writers who have given this problem careful study, the solution lies in a constitutional amendment. Considering the gravity of this issue and the ramifications of the solution, it is imperative that in any proposal advanced the paramount constitutional principle in our governmental framework is preserved. That is the doctrine of separation of powers.

One cannot predict the political crisis in which the Presidential powers may hang in balance. A review of the cases involving a disabled President reveals the anxiety and confusion which can prevail. It is also helpful to review the one case involving the impeachment clause of the Constitution. The intrigue and interplay within the Congress during the impeachment trial serves as a warning of clear and present dangers when Congress is called upon to consider where to place the mantle of the Presidential powers.

For these reasons our examination of proposed solutions should carefully weigh the wisdom of adopting a method which does not explicitly adhere to the principle of separation of powers. The exact procedure prescribed, if clear and direct, is not my concern. Nor am I wedded to any particular language. It is only the principle which pervades the Constitution which I strongly feel should be respected by any amendment.

With regard to Senate Joint Resolution 139, my preference would be to leave the matter of providing a method to subsequent legislation, so long as it is limited to a determination within the executive branch, and not lock in any specified plan in constitutional terms. It is therefore of considerable concern to me that Senate Joint Resolution 139 not only sets forth a particular method in an amendment but goes further to provide a procedure whereby Congress can be thrust into a controversy better left in the domain of the Executive.

ROMAN L. HRUSKA.

INDIVIDUAL VIEWS OF MR. KEATING

I heartily join in reporting favorably, with the amendments approved by the committee, this proposed constitutional amendment to the full Senate.

It is a great forward step, in my judgment, toward the final adoption of a workable solution of these twin problems, the problems of succession and inability which from the adoption of the Constitution have loomed as the most serious single threat to the stability and continuity of the American Presidency as an institution.

Yet much remains to be done. There is the task of shepherding this measure, or some version of it, through both Houses of the Congress by the required two-thirds vote in each; and then, for ratification by the States, through the required three-fourths of the State legislatures.

The process of amending the Constitution poses an additional dimension to the problem. It is not enough that we devise a solution which on its merits appears to be workable. More is required. The solution which we adopt here in the Senate must also be acceptable elsewhere. It must be acceptable to at least two-thirds of our colleagues in the House, many of whom have their own deeply held convictions, as evidenced in various bills and resolutions, as to how the problem should be handled. It must be acceptable also to as many members of 50 State legislatures as will make possible its approval in at least three-fourths of them. At bottom, of course, this means that the solution must be acceptable to the American people, who through their understanding of what needs to be done and their expression of confidence in what is being proposed, will ultimately decide the day in the Halls of Congress and in the State houses of the Nation.

It is not enough, therefore, that Senate Joint Resolution 139, as it is reported to the Senate, is a good solution and one that I myself can thoroughly and conscientiously support. What is involved, in addition, is the extent to which it will muster the support of others, so that these efforts will not be in vain. This is a weighty practical consideration. As many who have been concerned with these issues over the years have said, it is ever so much more important to reach an attainable solution than to strive for perfection at the considerable risk of bogging down in disagreement as to precise detail.

It is this reason, among others, which impels me to offer certain substitute language to this resolution which, if adopted, would in my judgment considerably enhance the chances of ultimate success as well as providing an equally workable and in some respects, superior plan.

These changes, which I shall describe and explain below, would leave unaffected in their entirety sections 1 and 2 of the proposed constitutional amendment. Both of these sections, one confirming the so-called Tyler precedent and extending it to cases of resignation and impeachment as well as death, the other providing for filling a vacancy in the Office of Vice President by Presidential nomination with confirmation by majority vote of both Houses of Congress, have my unqualified and wholehearted endorsement.

Sections 3, 4, and 5, on the other hand, which would enshrine quite detailed procedures on Presidential inability into the Constitution, give me serious pause. In my judgment, it would be preferable to simply provide by constitutional amendment that Congress shall have the authority to establish inability procedures by ordinary legislation. This would avoid freezing any particular method into the Constitution itself, make it easier to change the method if unforeseen defects are revealed by the actual operation of any congressionally prescribed plan, and most important, so simplify the amendment as to make it more readily understood and, hopefully, more likely of final congressional approval and ratification in the States.

I therefore intend to offer an amendment to Senate Joint Resolution 139, which would strike present sections 3, 4, and 5, and insert instead the following new sections 3, 4, and 5:

SEC. 3. In case of the inability of the President to discharge the powers and duties of the said office, the said powers and duties shall devolve on the Vice President as Acting President until the inability be removed.

SEC. 4. The Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then be President, or in the case of inability, act as President, and such officer shall be or act as President accordingly, until a President shall be elected or, in the case of inability, until the inability shall be earlier removed.

SEC. 5. The Congress may prescribe by law the method by which the commencement and termination of any inability shall be determined.

These three sections which I am proposing to substitute are identical to the last three sentences of Senate Joint Resolution 35, sponsored by the late Senator Kefauver and myself. Senate Joint Resolution 35 had earlier been approved by the Subcommittee on Constitutional Amendments and at this moment is still pending on the agenda of the parent Judiciary Committee.

Section 3 as I propose to amend it would make it clear that it is not the "office" but the "powers and duties of the office" of the President which devolve on the Vice President in cases of Presidential inability. By establishing the title of Acting President, the proposal would further clarify the status of the Vice President during the period when he is discharging the powers and duties of a disabled President. In addition, it would make clear that the President may reassume the powers and duties of his office when his inability has ended. In all these respects, section 3 as I offer it would be identical to section 3 of Senate Joint Resolution 139, except that no specific provision would be made for a Presidential declaration of his own inability which would temporarily displace him from the exercise of his powers and duties. Rather, under this proposal, the method by which the commencement of any period of inability is to be determined would be left for Congress to decide by ordinary legislation, as explained below.

The section 4 that I propose would clarify the authority of Congress to legislate on the subject of Presidential succession, both in cases of removal, death, and resignation, and also in cases of inability. It would permit Congress to declare "what officer shall be President" where both the President and Vice President have been eliminated by removal, death, or resignation. Then, if neither the President nor the Vice President is able to discharge the powers and duties of the Presidency due to their inability, the Congress would also be enabled to declare what officer shall—

act as President * * * until a President shall be elected,
or * * * until the inability shall be removed.

Finally, the section 5 that I will offer would authorize Congress to prescribe by law "the method by which the commencement and termination of any inability shall be determined." This provision

is at the heart of the amendments I propose, and represents my chief point of difference with Senate Joint Resolution 139 as reported.

Past efforts to frame a constitutional amendment on inability have endeavored, like Senate Joint Resolution 139, to set out in detail the procedure to determine commencement and termination of a period of Presidential inability. At one time, I myself favored the inability commission approach, and even at this late date there are quite a number of bills and resolutions in Congress to set up a commission. These proposals have varied greatly in detail as to the membership of such a commission, but most of them provide for either Cabinet, congressional, judicial, or medical representation, or a combination of one or more of these. Every such proposal, however, has become bogged down in argument as to whether, for example, Cabinet members who presumptively owe their primary loyalty to the President would overcome reluctance to take action adverse to him; or whether the service of legislators or judges on a commission would violate the spirit of the separation of powers doctrine; or whether doctors can be expected to participate wisely in the formulation of what is, at bottom, a political decision.

At long last, and after much debate, Senator Kefauver and I, simply as two Senators who had long sought a practical solution to this problem, agreed that if anything was going to be done, all of the detailed procedures which had been productive of delay and controversy had best be scrapped for the time being in favor of merely authorizing Congress in a constitutional amendment to deal with particular methods by ordinary legislation. This, we agreed, would later allow Congress to pick and choose the best form among all the proposals without suffering the handicap of having to rally a two-thirds majority in each House to do it. Senate Joint Resolution 35 was introduced to carry out the consensus we had reached.

The language of Senate Joint Resolution 35 stemmed initially from the New York Bar Association, and presently has the support of its committee on constitutional law. Its basic provisions were also favorably recommended by the American Bar Association's Committee on Jurisprudence and Law Reform in 1960, and in 1962 the American Bar Association reaffirmed its endorsement of what is now Senate Joint Resolution 35. At that time, the Association of the Bar of the City of New York endorse it, too. As recently as June of 1963, the then president-elect nominee of the American Bar Association testified in behalf of the association before the Constitutional Amendments Subcommittee in support of Senate Joint Resolution 35. Finally, the Deputy Attorney General, speaking for the Department of Justice, who testified in 1963 and who has reaffirmed his earlier testimony this year as still reflecting the Department's views, is in favor of the approach of Senate Joint Resolution 35. In short, at one time or another, Senate Joint Resolution 35 has had the approval of all of the bar associations which had devoted years of careful study and consideration to this problem. And while neither President Kennedy nor President Johnson chose to take a personal stand on any particular proposal, it may be fairly said that the Justice Department's continued endorsement of Senate Joint Resolution 35 is closely tantamount to an administration position.

As I understand it, the principal objection to the approach taken by Senate Joint Resolution 35 has been that it would give Congress a "blank check" in the area of presidential inability, and that State legislators especially would balk at a "blank check" constitutional amendment. Apart from the fact that the Constitution in major part is full of "blank check" provisions—the enumerated powers of Congress under article I provide the most noteworthy example—and that, moreover, the States have previously ratified "blank check" amendments such as, for example, the income tax amendment, and the prohibition amendment which left all enforcement details to Congress, the short answer is that Congress here would not be left free to do whatever it wishes. Here is what the Deputy Attorney General, speaking for the Justice Department, had to say on that point:

One objection may be that this provision is a blank check which, if abused, could upset the balance of power between the legislative and executive branches, and place the President at the mercy of a hostile Congress. I think this danger is quite remote, and at all events not great enough to outweigh the advantages of conferring this authority upon the Congress which represents the national electorate over more complex constitutional provisions. If the methods adopted by Congress for dealing with the problem do not meet the standards of the separation of powers or otherwise satisfy the President, he may veto the bill, and his veto could be overridden only by two-thirds of each House. Moreover, if Congress enacts a measure which is approved by the President, and thereafter attempts to amend or repeal it, its action will also be subject to approval or veto by the President. It seems unlikely, therefore, that any bill would ever be enacted into law which was not acceptable to the President, and which did not afford adequate protection to the people and to the office of President (1964 hearings, p. 201).

It should be added to this, of course, that the President's approval is not required for a proposed constitutional amendment to go to the States for ratification. In my judgment, it is very important, both as a matter of substance and symbolically, that the Presidency as an institution place its imprimatur upon whatever concrete procedures on presidential inability are ultimately decided upon. Establishing inability procedures by ordinary statute, as would be authorized by my proposed section 5, would permit the President, in behalf of himself and the office he occupies, to participate in the process of setting up proper inability procedures.

I cannot too enthusiastically join in the fine analysis of the Deputy Attorney General as to the other overriding advantages of the flexible approach embodied in Senate Joint Resolution 35. The Deputy Attorney General has stated:

* * * The wisdom of loading the Constitution down by writing detailed procedural and substantive provisions into it has been questioned by many scholars and statesmen. The framers of the Constitution saw the wisdom of using broad and expanding concepts and principles that could be adjusted to keep pace with current needs. The chances are that sup-

plemental legislation would be required in any event. In addition, crucial and urgent new situations may arise in the changing future * * * where it may be of importance that Congress, with the President's approval, should be able to act promptly without being required to resort to still another amendment to the Constitution. Senate Joint Resolution 35 makes this possible.

Since it is difficult to foresee all of the possible circumstances in which the Presidential inability problem could arise, *we are opposed to any constitutional amendment which attempts to solve all these questions by a series of complex procedures.* We think that the best solution to the basic problems that remain would be a simple constitutional amendment, such as Senate Joint Resolution 35, * * *. Such an amendment would supply the flexibility which we think is indispensable and, at the same time, put to rest what legal problems may exist under the present provisions of the Constitution as supplemented by practice and understanding. [Emphasis supplied.] (1964 hearings, p. 203.)

And finally, I repeat that the simpler amendment, so capable of being readily understood by the people and by their representatives in the State legislatures, is in the tradition of constitutionmaking. The States have ratified a whole series of amendments giving Congress the power to enforce them "by appropriate legislation," including the 13th amendment prohibiting slavery; the 14th amendment's due process, equal protection and other civil rights clauses; the 15th amendment's voting guarantees; the 16th amendment's broad grant of income-taxing authority; the 18th or prohibition amendment; the 19th or women's suffrage amendment; and the 23d or District of Columbia vote amendment. There is absolutely no reason why State legislators should not wish to grant similar broad powers to Congress here where, unlike as in many previous amendments, no fundamental clash is involved between the respective powers of the Federal and State governments and the matter merely goes to the mechanics, although very important mechanics to be sure, of coping with potential emergencies in the office of Chief Executive of the Federal Government.

So that there may be no basis for misunderstanding, I intend to offer my proposed amendments not out of intransigent opposition to Senate Joint Resolution 139 but out of a firm belief that the Senate should be afforded an opportunity to exercise its best political judgment in choosing between two reasonable alternatives. Most if not all of us are well enough acquainted with our respective State legislatures to form a rough "guesstimate" as to which alternative will fare better in the process of submitting an amendment to the States for ratification. And all of us, I am sure, have our firm notions as to the nature of constitutionmaking and how best to frame a provision which the American people may have to live with for a long time.

If the amendments I intend to offer are approved by a majority of the Senate, other members of the Subcommittee on Constitutional Amendments, we have agreed, will be prepared to endorse the new sections and work for their approval in the States. On the other hand, if my amendments are not approved here, I shall fully and

unreservedly vote for Senate Joint Resolution 139 as it presently stands and do all within my power to finally bring about its adoption as a solution to this most important and fundamental problem of American Government.

KENNETH B. KEATING.

Calendar No. 62

89TH CONGRESS
1st Session

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SENATE

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REPORT
No. 66PRESIDENTIAL INABILITY AND VACANCIES IN THE
OFFICE OF THE VICE PRESIDENT

FEBRUARY 10, 1965.—Ordered to be printed

Mr. BAYH, from the Committee on the Judiciary, submitted
the following

REPORT

together with

INDIVIDUAL VIEWS

[To accompany S. J. Res. 1]

The Committee on the Judiciary, to which was referred the resolution (S.J. Res. 1), proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office, having considered the same, reports favorably thereon with amendments and recommends that the resolution as amended be agreed to.

AMENDMENTS

On page 2, in line 14, strike "If the President declares in writing" and insert in lieu thereof: "Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration".

On page 2, strike the entire text of section 4, and insert in lieu thereof the following:

Whenever the Vice President, and a majority of the principal officers of the executive departments or such other body as Congress may by law provide, transmit to the President of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

On page 3, in lines 1 and 2, strike the word "Congress" and insert in lieu thereof the following:

President of the Senate and the Speaker of the House of Representatives

On page 3, in line 5, strike the word "heads" and insert in lieu thereof the following: "principal officers".

On page 3, in line 9, strike the words "will immediately" and insert in lieu thereof "shall immediately proceed to".

PURPOSE OF AMENDMENTS

The text of Senate Joint Resolution 1, as introduced, requires, under certain contingencies, for a written declaration to be made by the President, under section 3, and by the Vice President and principal officers of the executive departments under section 4, and by the President, the Vice President and principal officers of the executive departments under section 5. It is the intention of the committee that for the best interests of the country to be served, notice by all parties should be public notice. The committee feels that notice by transmittal to the President of the Senate and the Speaker of the House of Representatives guarantees notice to the entire country.

The committee is concerned about the possibility that such written declaration might be transmitted during a period in which Congress was not in session. In this event the committee feels that transmittal of such written declaration to the presiding officers of both Houses, the President of the Senate and the Speaker of the House of Representatives, would be sufficient transmittal under the terms of this amendment.

It is the opinion of the committee that, under the language of section 5, Congress is empowered to reconvene in special session to consider any disability question arising under this section. Furthermore, under the language of this section, the President of the Senate and the Speaker of the House of Representatives would be required to call a special session of the Congress to consider the question of presidential inability whenever the President's ability to perform the powers and duties of his office are questioned under the terms of section 5. However, nothing contained in this proposed amendment should be construed to limit the power of the President from exercising his existing constitutional authority to call for a special session of the Congress.

It is further understood by the committee that should the President of the Senate and the Speaker of the House of Representatives not be found in their offices at the time the declaration was transmitted that transmittal to the office of such presiding officers would suffice for sufficient notice under the terms of this amendment.

It is the judgment of the committee that the language "principal officers of the executive departments" more adequately conveys the intended meaning of sections 4 and 5, that only those members of the President's official Cabinet were to participate in any decision of disability referred to under these sections. This language finds precedent under article II, section 2, clause 1, of the Constitution. The pertinent language there reads as follows:

he may require the Opinion, in writing, of the principal Officer in each of the executive Departments,

In its discussion of the ramifications of section 5, the committee considered it important to add additional stress to the interpretation of two questions which might arise:

(1) Who has the powers and duties of the office of the President while the provisions of section 5 are being implemented?

(2) Under what sense of urgency is Congress required to act in carrying out provisions of this section?

Under the terms of section 3 a President who voluntarily transfers his powers and duties to the Vice President may resume these powers and duties by making a written declaration of his ability to perform the powers and duties of his office and transmitting such declaration to the President of the Senate and the Speaker of the House of Representatives. This will reduce the reluctance of the President to utilize the provisions of this section in the event he fears it would be difficult for him to regain his powers and duties once he has voluntarily relinquished them.

However, the intent of section 5 is that the Vice President is to continue to exercise the powers and duties of the office of Acting President until a determination on the President's inability is made by Congress. It is also the intention of the committee that the Congress should act swiftly in making this determination, but with sufficient opportunity to gather whatever evidence it determined necessary to make such a final determination. The language, as amended, reads as follows:

Thereupon Congress shall immediately proceed to decide the issue.

It was the opinion of the committee that the words "Thereupon", "shall", and "immediately" were sufficiently strong to indicate the necessity for prompt action.

Precedence for the use of the word "immediately" and the interpretation thereof may be found in the use of this same word, "immediately" in the 12th amendment to the Constitution. In the 12th amendment, in the event no candidate for President receives a majority of the electoral votes, the House of Representatives "shall choose immediately,". The committee was of the opinion that the same sense of urgency attendant to the use of the word "immediately" in the 12th amendment when Congress was in fact deciding who would be the President of the United States should be attendant in proceedings in which the Congress was deciding whether the President of the United States should be removed from his office because of his inability to perform the powers and duties thereof.

The committee is concerned that congressional action under the terms of section 5 should be taken under the greatest sense of urgency. However, because of the complexities involved in determining different types of disability, it is felt unwise to prescribe any specific time limitation to congressional deliberation thereupon. Indeed, the committee feels that Congress should be permitted to collect all necessary evidence and to participate in the debate needed to make a considered judgment.

The discussion of the committee made it abundantly clear that the proceedings in the Congress prescribed in section 5 would be pursued under rules prescribed, or to be prescribed, by the Congress itself.

PURPOSE OF THE RESOLUTION AS AMENDED

The purpose of Senate Joint Resolution 1, as amended, is to provide for continuity in the office of the Chief Executive [in the event that the President becomes unable to exercise the powers and duties of the office] and further, to provide for the filling of vacancies in the office of the Vice President whenever such vacancies may occur.

STATEMENT

The constitutional provisions

The Constitution of the United States, in article II, section 1, clause 5, contains provisions relating to the continuity of the executive power at times of death, resignation, inability, or removal of a President. No replacement provision is made in the Constitution where a vacancy occurs in the Office of the Vice President. Article II, section 1, clause 5 reads as follows:

In Case of the Removal of the President from Office, or at his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

This is the language of the Constitution as it was adopted by the Constitutional Convention upon recommendation of the Committee on Style. When this portion of the Constitution was submitted to that Committee it read as follows:

In case of his (the President's) removal as aforesaid, death, absence, resignation, or inability to discharge the powers of duties of his office, the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.

The Legislature may declare by law what officer of the United States shall act as President, in case of the death, resignation, or disability of the President and Vice President; and such officer shall act accordingly, until such disability be removed, or a President shall be elected.

While the Committee on Style was given no authority to change the substance of prior determinations of the Convention, it is clear that this portion of the draft which that Committee ultimately submitted was a considerable alteration of the proposal which the Committee had received.

The inability clause and the Tyler precedent

The records of the Constitutional Convention do not contain any explicit interpretation of the provisions as they relate to inability. As a matter of fact, the records of the Convention contain only one apparent reference to the aspects of this clause which deal with the

question of disability. It was Mr. John Dickinson, of Delaware, who, on August 27, 1787, asked:

What is the extent of the term "disability" and who is to be the judge of it? (Farrand, "Records of the Constitutional Convention of 1787," vol. 2, p. 427.)

The question is not answered so far as the records of the Convention disclose.

It was not until 1841 that this clause of the Constitution was called into question by the occurrence of one of the listed contingencies. In that year President William Henry Harrison died, and Vice President John Tyler faced the determination as to whether, under this provision of the Constitution, he must serve as Acting President or whether he became the President of the United States. Vice President Tyler gave answer by taking the oath as President of the United States. While this evoked some protest at the time, noticeably that of Senator William Allen, of Ohio, the Vice President (Tyler) was later recognized by both Houses of Congress as President of the United States (Congressional Globe, 27th Cong., 1st sess., vol. 10, pp. 3-5, May 31-June 1, 1841).

This precedent of John Tyler has since been confirmed on seven occasions when Vice Presidents have succeeded to the Presidency of the United States by virtue of the death of the incumbent President. Vice Presidents Fillmore, Johnson, Arthur, Theodore Roosevelt, Coolidge, Truman, and Lyndon Johnson all became President in this manner.

The acts of these Vice Presidents, and the acquiescence in, or confirmation of, their acts by Congress have served to establish a precedent that, in one of the contingencies under article II, section 1, clause 5, that of death, the Vice President becomes President of the United States.

The clause which provides for succession in case of death also applies to succession in case of resignation, removal from office, or inability. In all four contingencies, the Constitution states: "the same shall devolve on the Vice President."

Thus it is said that whatever devolves upon the Vice President upon death of the President, likewise devolves upon him by reason of the resignation, inability, or removal from office of the President. (Theodore Dwight, "Presidential Inability, North American Review," vol. 133, p. 442 (1919).)

The Tyler precedent, therefore, has served to cause doubt on the ability of an incapacitated President to resume the functions of his office upon recovery. Professor Dwight, who later became president of Yale University, found further basis for this argument in the fact that the Constitution, while causing either the office, or the power and duties of the office, to "devolve" upon the Vice President, is silent on the return of the office or its functions to the President upon recovery. Where both the President and Vice President are incapable of serving, the Constitution grants Congress the power to declare what officer shall act as President "until the disability is removed."

These considerations apparently moved persons such as Daniel Webster, who was Secretary of State when Tyler took office as President, to declare that the powers of the office are inseparable from the

office itself and that a recovered President could not displace a Vice President who had assumed the prerogatives of the Presidency. This interpretation gains support by implication from the language of article I, section 3, clause 5 of the Constitution which provides that:

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the *office* of President of the United States. [*Italic supplied.*]

The doubt engendered by precedent was so strong that on two occasions in the history of the United States it has contributed materially to the failure of Vice Presidents to assume the office of President at a time when a President was disabled. The first of these occasions arose in 1881 when President Garfield fell victim of an assassin's bullet. President Garfield lingered for some 80 days during which he performed but one official act, the signing of an extradition paper. There is little doubt but that there were pressing issues before the executive department at that time which required the attention of a Chief Executive. Commissions were to be issued to officers of the United States. The foreign relations of this Nation required attention. There was evidence of mail frauds involving officials of the Federal Government. Yet only such business as could be disposed of by the heads of Government departments, without Presidential supervision, was handled. Vice President Arthur did not act. Respected legal opinion of the day was divided upon the ability of the President to resume the duties of his office should he recover. (See opinions of Lyman Trumbull, Judge Thomas Cooley, Benjamin Butler and Prof. Theodore Dwight, "Presidential Inability, North American Review," vol. 133, pp. 417-446 (1881).)

The division of legal authority on this question apparently extended to the Cabinet, for newspapers of that day, notably the New York Herald, the New York Tribune, and the New York Times contain accounts stating that the Cabinet considered the question of the advisability of the Vice President acting during the period of the President's incapacity. Four of the seven Cabinet members were said to be of the opinion that there could be no temporary devolution of Presidential power on the Vice President. This group reportedly included the then Attorney General of the United States, Mr. Wayne MacVeagh. All of Garfield's Cabinet were of the view that it would be desirable for the Vice President to act but since they could not agree upon the ability of the President to resume his office upon recovery, and because the President's condition prevented them from presenting the issue to him directly the matter was dropped.

It was not until President Woodrow Wilson suffered a severe stroke in 1919 that the matter became one of pressing urgency again. This damage to President Wilson's health came at a time when the struggle concerning the position of the United States in the League of Nations was at its height. Major matters of foreign policy such as the Shantung Settlement were unresolved. The British Ambassador spent 4 months in Washington without being received by the President. Twenty-eight acts of Congress became law without the President's signature (Lindsay Rogers, "Presidential Inability, the Review," May 8, 1920; reprinted in 1958 hearings before Senate Subcommittee on Constitutional Amendments, pp. 232-235). The President's

wife and a group of White House associates acted as a screening board on decisions which could be submitted to the President without impairment of his health. (See Edith Bolling Wilson, "My Memoirs," pp. 288-290; Hoover, "Forty-two Years in the White House," pp. 105-106; Tumulty, "Woodrow Wilson as I Know Him," pp. 437-438.)

As in 1881, the Cabinet considered the advisability of asking the Vice President to act as President. This time, there was considerable opposition to the adoption of such procedure on the part of assistants of the President. It has been reported by a Presidential secretary of that day that he reproached the Secretary of State for suggesting such a possibility (Joseph P. Tumulty, "Woodrow Wilson as I Know Him," pp. 443-444). Upon the President's ultimate recovery, the President caused the displacement of the Secretary of State for reasons of alleged disloyalty to the President (Tumulty, "Woodrow Wilson as I Know Him," pp. 444-445).

On three occasions during the Eisenhower administration, incidents involving the physical health of the President served to focus attention on the inability clause.

President Eisenhower became concerned about the gap in the Constitution relative to Presidential inability, and he attempted to reduce the hazards by means of an informal agreement with Vice President Nixon. The agreement provided:

1. In the event of inability the President would, if possible, so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.

2. In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the office and would serve as Acting President until the inability had ended.

3. The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the Office.

President Kennedy entered into a similar agreement with Vice President Johnson as did President Johnson with Speaker John McCormack and Vice President Hubert Humphrey. Such informal agreements cannot be considered an adequate solution to the problem because: (A) Their operation would differ according to the relationship between the particular holders of the offices; (B) a private agreement cannot give the Vice President clear authority to discharge powers conferred on the President by the Constitution, treaties, or statutes; (C) no provision is made for the situation in which a dispute exists over whether or not the President is disabled. Former Attorneys General Brownell and Rogers as well as Attorney General Kennedy agree that the only definitive method to settle the problem is by means of a constitutional amendment.

THE NEED FOR CHANGE

The historical review of the interpretation of article II, section 1, clause 5, suggests the difficulties which it has already presented. The language of the clause is unclear, its application uncertain. The

clause couples the contingencies of a permanent nature such as death, resignation, or removal from office, with inability, a contingency which may be temporary. It does not clearly commit the determination of inability to any individual or group, nor does it define inability so that the existence of such a status may be open and notorious. It leaves uncertain the capacity in which the Vice President acts during a period of inability of the President. It fails to define the period during which the Vice President serves. It does not specify that a recovered President may regain the prerogatives of his office if he has relinquished them. It fails to provide any mechanism for determining whether a President has in fact recovered from his inability, nor does it indicate how a President, who sought to recover his prerogatives while still disabled, might be prevented from doing so.

The resolution of these issues is imperative if continuity of Executive power is to be preserved with a minimum of turbulence at times when a President is disabled. Continuity of executive authority is more important today than ever before. The concern which has been manifested on previous occasions when a President was disabled, is increased when the disability problem is weighed in the light of the increased importance of the Office of the Presidency to the United States and to the world.

This increased concern has in turn manifested an intensified examination of the adequacy of the provisions relating to the orderly transfer of the functions of the Presidency. Such an examination is not reassuring. The constitutional provision has not been utilized because its procedures have not been clear. After 175 years of experience with the Constitution the inability clause remains an untested provision of uncertain application.

METHOD OF CHANGE

In previous instances in history when this question has arisen, one of the major considerations has been whether Congress could constitutionally proceed to resolve the problem by statute, or whether an enabling constitutional amendment would be necessary. As early as 1920, when the Committee on the Judiciary of the House of Representatives, 66th Congress, 2d session, considered the problem, Representatives Madden, Rogers, and McArthur took the position that the matter of disability could be dealt with by statute without an amendment to the Constitution, whereas Representative Fess was of the opinion that Congress was not authorized to act under the Constitution, and that an amendment would first have to be adopted (hearings before the Committee on the Judiciary, House of Representatives, February 26 and March 1, 1920). Through the years, this controversy has increased in intensity among Congressmen and constitutional scholars who have considered the presidential inability problem.

Those who feel that Congress does not have the authority to resolve the matter by statute claim that the Constitution does not support a reasonable inference that Congress is empowered to legislate. They point out that article II, section 1, clause 5 of the Constitution authorized Congress to provide by statute for the case where both the President and Vice President are incapable of serving. By implication Congress does not have the authority to legislate with regard to the

situation which concerns only a disabled President, with the Vice President succeeding to his powers and duties. Apparently this is the proper construction, because the first statute dealing with Presidential succession under article II, section 1, clause 6, which was enacted by contemporaries of the framers of the Constitution, did not purport to establish succession in instances where the President alone was disabled (act of March 1, 1792, 1 Stat. 239).

Serious doubts have also been raised as to whether the "necessary and proper" authority of article I, section 8, clause 18, gives the Congress the power to legislate in this situation. The Constitution does not vest any department or office with the power to determine inability, or to decide the term during which the Vice President shall act, or to determine whether and at what time the President may later regain his prerogatives upon recovery. Thus it is difficult to argue that article I, section 8, clause 18 gives the Congress the authority to make all laws which shall be necessary and proper for carrying out such powers.

In recent years, there seems to have been a strong shift of opinion in favor of the proposition that a constitutional amendment is necessary, and that a mere statute would not be adequate to solve the problem. The last three Attorneys General who have testified on the matter, Herbert Brownell, William P. Rogers, and Acting Attorney General Nicholas deB. Katzenbach, have agreed an amendment is necessary. In addition to the American Bar Association and the American Association of Law Schools, the following organizations have agreed an amendment is necessary: the State bar associations of Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kansas, Louisiana, Michigan, Ohio, Rhode Island, Texas, Virginia, Vermont; and the bar associations of Denver, Colo.; the District of Columbia; Dade County, Fla.; city of New York; Passaic County, N.J.; Greensboro, N.C.; York County, Pa.; and Milwaukee, Wis.

The most persuasive argument in favor of amending the Constitution is that so many legal questions have been raised about the authority of Congress to act on this subject without an amendment that any statute on the subject would be open to criticism and challenge at the most critical time—that is, either when a President had become disabled, or when a President sought to recover his office. Under these circumstances, there is an urgent need to adopt an amendment which would distinctly enumerate the proceedings for determination of the commencement and termination of disability.

Filling of vacancies in the Office of the President

While the records of the Constitutional Convention disclosed little insight on the framers' interpretation of the inability provisions of the Constitution, they do reveal that wide disagreement prevailed concerning whether or not a Vice President was needed. If he was needed, what were to be his official duties, if any.

The creation of the office of Vice President came in the closing days of the Constitutional Convention. Although such a position was considered very early in the Convention, later proposals envisaged the President of the Senate, the Chief Justice and even a council of advisers, as persons who would direct the executive branch should a lapse of Executive authority come to pass:

On September 4, 1787, a Committee of Eleven, selected to deliberate those portions of the Constitution which had been postponed, recommended that an office of Vice President be created and that he be elected with the President by an electoral college. On September 7, 1787, the Convention discussed the Vice-Presidency and the duties to be performed by the occupant of the office. Although much deliberation ensued regarding the official functions of the office, little thought seems to have been given to the succession of the Vice President to the office of President in case of the death of the President.

A committee, designated to revise the style of and arrange the articles agreed to by the House, returned to Convention on September 12, 1787, a draft which for all practical purposes was to become the Constitution of the United States. It contemplated two official duties for the Vice President: (1) to preside over the Senate, in which capacity he would vote when the Senate was "equally divided" and open the certificates listing the votes of the presidential electors, and (2) to discharge the powers and duties of the President in case of his death, resignation, removal, or inability.

While the Constitution does not address itself in all cases to specifics regarding the Vice President as was the case for the President, the importance of the office in view of the Convention is made apparent by article II, section 1, clause 3. This clause, the original provision for the election of the President and the Vice President, made it clear that it was designed to insure that the Vice President was a person equal in stature to the President.

The intent of the Convention, however, was totally frustrated when the electors began to distinguish between the two votes which article II, section 1, clause 3 had bestowed upon them. This inherent defect was made painfully apparent in the famous Jefferson-Burr election contest of 1800, and in 1804 the 12th amendment modified the college voting to prevent a reoccurrence of similar circumstances.

There is little doubt the 12th amendment removed a serious defect from the Constitution. However, its passage, coupled with the growing political practice of nominating Vice Presidents to appease disappointed factions of the parties, began a decline that was in ensuing years to mold the Vice-Presidency into an office of inferiority and disparagement.

Fortunately, this century saw a gradual resurgence of the importance of the Vice-Presidency. He has become a regular member of the Cabinet, Chairman of the National Aeronautics and Space Council, Chairman of the President's Committee on Equal Employment Opportunities, a member of the National Security Council, and a personal envoy for the President. He has in the eyes of Government regained much of the "equal stature" which the framers of the Constitution contemplated he should entertain.

THE NEED FOR CHANGE

The death of President Kennedy and the accession of President Johnson in 1963 pointed up once again the abyss which exists in the executive branch when there is no incumbent Vice President. Sixteen times the United States of America has been without a Vice President, totaling 37 years during our history.

As has been pointed out, the Constitutional Convention in its wisdom foresaw the need to have a qualified and able occupant of the Vice President's office should the President die. They did not, however, provide the mechanics whereby a Vice-Presidential vacancy could be filled.

The considerations which enter into a determination of whether provisions for filling the office of Vice President when it becomes vacant should be made by simple legislation or require a constitutional amendment are similar to those which enter into the same kind of determination about Presidential inability provisions. In both cases, there is some opinion that Congress has authority to act. However, the arguments that an amendment is necessary are strong and supported by many individuals. We must not gamble with the constitutional legitimacy of our Nation's executive branch. When a President or a Vice President of the United States assumes his office, the entire Nation and the world must know without doubt that he does so as a matter of right. Only a constitutional amendment can supply the necessary air of legitimacy.

The argument that Congress can designate a Vice President by law is at best a weak one. The power of Congress in this regard is measured principally by article II, section 1, clause 6 which states that—

the Congress may by law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the Disability be removed, or a President shall be elected.

This is not in specific terms a power to declare what officer shall be Vice President. It is a power to declare upon what officer the duties and powers of the office of President shall devolve when there is neither President nor Vice President to act.

To stand by ready for the powers and duties of the Presidential office to devolve upon him at the time of death or inability of the President, is the principal constitutional function of the Vice President. It is clear that Congress can designate the officer who is to perform that function when the office of Vice President is vacant. Indeed it has done so in each of the Presidential Succession Acts. Should there be any more objection to designating that officer Vice President than there is to designating as President the Vice President upon whom devolve the powers and duties of a deceased President, for which designation there is no specific constitutional authorization?

The answer to that question is "Yes." The Constitution has given the Vice President another duty and sets forth specific instructions as to who is to perform it in his absence. Article I, section 2, clause 4, provides that the Vice President shall be the President of the Senate and clause 5 provides that the Senate shall choose its other officers including a "President pro Tempore, in the Absence of the Vice President or when he shall exercise the Office of the President of the United States." It is very difficult to argue that a person designated Vice President by Congress, or selected in any way other than by the procedures outlined in amendments 12 and 22 can be, the President of the Senate.

One of the principal reasons for filling the office of Vice President when it becomes vacant is to permit the person next in line to become

familiar with the problems he will face should he be called upon to act as President, e.g., to serve on the National Security Council, head the President's Committee on Equal Employment Opportunity, participate in Cabinet meetings and take part in other top-level discussions which lead to national policymaking decisions. Those who consider a law sufficient to provide for filling a Vice Presidential vacancy point out that the Constitution says nothing about such duties and there is therefore nothing to prevent Congress from assigning these duties to the officer it designates as next in line in whatever Presidential succession law it enacts. Regardless of what office he held at the time of his designation as Vice President, however, he would have a difficult time carrying out the duties of both offices at the same time.

When, to all these weaknesses, one adds the fact that no matter what laws Congress may write describing the duties of the officer it designates to act as Vice President, the extent to which the President takes him into his confidence or shares with him the deliberations leading to executive decisions is to be determined largely by the President rather than by statute, practical necessity would seem to require not only that the procedure for determining who fills the Vice-Presidency when it becomes vacant be established by constitutional amendment but that the President be given an active role in the procedure whatever it be.

Finally, as in the case of inability, the most persuasive argument in favor of amending the Constitution is the division of authority concerning the authority of Congress to act on this subject. With this division in existence it would seem that any statute on the subject would be open to criticism and challenge at a time when absolute legitimacy was needed.

ANALYSIS

Inability

The proposal now being submitted is cast in the form of a constitutional amendment for the reasons which have been outlined earlier.

Article II, section 1, clause 5 of the Constitution is unclear on two important points. The first is whether the "office" of the President or the "powers and duties of the said office" devolve upon the Vice President in the event of Presidential inability. The second is who has the authority to determine what inability is, when it commences, and when it terminates. Senate Joint Resolution 1 resolves both questions.

The first section would affirm the historical practice by which a Vice President has become President upon the death of the President, further extending the practice to the contingencies of resignation or removal from office. It separates the provisions relating to inability from those relating to death, resignation, or removal, thereby eliminating any ambiguity in the language of the present provision in article II, section 1, clause 5.

Sections 3, 4, and 5 embrace the procedures for determining the commencement and termination of Presidential inability.

Section 3 lends constitutional authority to the practice that has heretofore been carried out by informal agreements between the President and the person next in the line of succession. It makes clear that the President may declare in writing his disability and that upon such an occurrence the Vice President becomes Acting President.

By establishing the title of Acting President the proposal makes clear that it is not the "office" but the "powers and duties of the office" that devolve on the Vice President and further clarifies the status of the Vice President during the period when he is discharging the powers and duties of a disabled President.

Section 4 is the first step, of two, that embraces the most difficult problem of inability—the factual determination of whether or not inability exists. Under this section, if a President does not declare that an inability exists, the Vice President, if satisfied that the President is disabled shall, with the written approval of a majority of the heads of the executive departments, assume the discharge of the powers and duties of the Office as Acting President upon the transmission of such declaration to the Congress.

The final success of any constitutional arrangement to secure continuity in cases of inability must depend upon public opinion with a possession of a sense of "constitutional morality." Without such a feeling of responsibility there can be no absolute guarantee against usurpation. No mechanical or procedural solution will provide a complete answer if one assumes hypothetical cases in which most of the parties are rogues and in which no popular sense of constitutional propriety exists. It seems necessary that an attitude be adopted that presumes we shall always be dealing with "reasonable men" at the highest governmental level. The combination of the judgment of the Vice President and a majority of the Cabinet members appears to furnish the most feasible formula without upsetting the fundamental checks and balances between the executive, legislative, and judicial branches. It would enable prompt action by the persons closest to the President, both politically and physically, and presumably most familiar with his condition. It is assumed that such decision would be made only after adequate consultation with medical experts who were intricately familiar with the President's physical and mental condition.

There are many distinguished advocates for a specially constituted group in the nature of a factfinding body to determine presidential inability rather than the Cabinet. However, such a group would face many dilemmas. If the President is so incapacitated that he cannot declare his own inability the factual determination of inability would be relatively simple. No need would exist for a special factfinding body. Nor is a factfinding body necessary if the President can and does declare his own inability. If, however, the President and those around him differ as to whether he does suffer from an inability which he is unwilling to admit, then a critical dispute exists. But this dispute should not be determined by a special commission composed of persons outside the executive branch. Such a commission runs a good chance of coming out with a split decision. What would be the effect, for example, if a commission of seven voted 4 to 3 that the President was fit and able to perform his Office? What power could he exert during the rest of his term when, by common knowledge, a change of one vote in the commission proceedings could yet deny him the right to exercise the powers of his Office? If the vote were the other way and the Vice President were installed as Acting President, what powers could he exert when everyone would know that one vote the other way could cause his summary removal from the exercise of Presidential powers? If the man acting as President were placed

in this awkward, completely untenable and impotent position, the effect on domestic affairs would be bad enough; the effect on the international position of the United States might well be catastrophic.

However, in the interest of providing flexibility for the future, the amendment would authorize the Congress to designate a different body if this were deemed desirable in light of subsequent experience.

Section 5 of the proposed amendment would permit the President to resume the powers and duties of the office upon his transmission to the President of the Senate and the Speaker of the House of Representatives of his written declaration that no inability existed. However, should the Vice President and a majority of the principal officers of the executive departments feel that the President is unable, then they could prevent the President from resuming the powers and duties of the office by transmitting their written declaration so stating to the President of the Senate and the Speaker of the House of Representatives within 2 days. Once the declaration of the President stating no inability exists has been transmitted to the President of the Senate and the Speaker of the House of Representatives, then the issue is squarely joined. At this point the proposal recommends that the Congress shall make the final determination on the existence of inability. If the Congress determines by a two-thirds vote of both Houses that the President is unable, then the Vice President continues as Acting President. However, should the Congress fail in any manner to cast a vote of two-thirds or more in both Houses supporting the position that the President was unable to perform the powers and duties of his office, then the President would resume the powers and duties of the office. The recommendation for a vote of two-thirds is in conformity with the provision of article I, section 3, clause 6, of the Constitution relating to impeachments.

This proposal achieves the goal of an immediate original transfer in Executive authority and the resumption of it in consonance both with the original intent of the framers of the Constitution and with the balance of powers among the three branches of our Government which is the permanent strength of the Constitution.

Vacancies

Section 2 is intended to virtually assure us that the Nation will always possess a Vice President. It would require a President to nominate a person who meets the existing constitutional qualifications to be Vice President whenever a vacancy occurred in that office. The nominee would take office as Vice President once he had been confirmed by a majority vote in both Houses of the Congress.

In considering this section of the proposal, it was observed that the office of the Vice President has become one of the most important positions in our country. The days are long past when it was largely honorary and of little importance, as has been previously pointed out. For more than a decade the Vice President has borne specific and important responsibilities in the executive branch of Government. He has come to share and participate in the executive functioning of our Government, so that in the event of tragedy, there would be no break in the informed exercise of executive authority. Never has this been more adequately exemplified than by the uninterrupted assumption of the Presidency by Lyndon B. Johnson.

It is without contest that the procedure for the selection of a Vice President must contemplate the assurance of a person who is compatible with the President. The importance of this compatibility is recognized in the modern practice of both major political parties in according the presidential candidate a voice in choosing his running mate subject to convention approval. This proposal would permit the President to choose his Vice President subject to congressional approval. In this way the country would be assured of a Vice President of the same political party as the President, someone who would presumably work in harmony with the basic policies of the President.

CONCLUSION

This amendment seeks to remove a vexatious constitutional problem from the realm of national concern. It seeks to concisely clarify the ambiguities of the present provision in the Constitution. In so doing, it recognizes the vast importance of the office involved, and the necessity to maintain continuity of the Executive power of the United States.

The committee approved this proposal after its subcommittee heard testimony and received written statements from many distinguished students on the subject. Last year the subcommittee also had the benefit of considerable study reflected in congressional documents previously published on this subject. In the light of all this material and evidence, and for the fact that 76 Senators have sponsored Senate Joint Resolution 1, the committee believes that a serious constitutional gap exists with regard to Presidential inability and vacancies in the office of the Vice President, and that the proposal which is now presented is the best solution to the problem.

RECOMMENDATION

The committee, after considering the several proposals now pending before it relating to the matter of Presidential inability, reports favorably on Senate Joint Resolution 1 and recommends its submission to the legislatures of the several States of the United States so that it may become a part of the Constitution of the United States.

COMMITTEE AMENDMENTS TO SENATE JOINT RESOLUTION 1 SHOWING OMISSIONS, NEW MATTER AND RETAINED WORDING

The committee amendments to the Senate joint resolution are shown as follows: Provisions of the resolution as introduced which are omitted are enclosed in black brackets, new matter is printed in italics, provisions in which no change is proposed are shown in roman.

"Article—

SEC. 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SEC. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President

who shall take office upon confirmation by a majority vote of both Houses of Congress.

SEC. 3. [If the President declares in writing] *Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his Office, such powers and duties shall be discharged by the Vice President as Acting President.*

SEC. 4. [If the President does not so declare, and the] *Whenever the Vice President, [with the written concurrence of] and a majority of the [heads] principal officers of the executive departments or such other body as Congress may by law provide, transmit[s] to the [Congress his] President of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.*

SEC. 5. *Whenever the President transmits to the [Congress] President of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the [heads] principal officers of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress [will] shall immediately proceed to decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.*

INDIVIDUAL VIEWS OF SENATOR EVERETT MCKINLEY DIRKSEN

When the Congress considers amendments to the Constitution, it deals not with the problems of today, or yesterday, or tomorrow, but in terms of the grand sweep of our Nation's history and future. The Constitution is the basic charter of our Government. It is appropriate to keep its function separate from the various laws we derive from it, laws that are designed to meet specific problems as they may arise. The Constitution must meet the test of time. It can do this only if it provides the means by which the Congress may meet the needs of the moment, not the solution to specific problems.

The questions of Presidential succession and Presidential inability are not new to the Senate. It has been wrestling with them for many years. Time and again it has tried its hand at contriving an amendment to the Constitution to deal with the problems. But each time when the Senate almost reaches a conclusion as to language for the amendment it becomes aware that its labors have been so narrowly directed to the problems arising out of particular events that it has failed to think and write in the broad fundamental concepts which are necessary to a constitutional amendment. And then, because it realizes the dangers of a job half done, it does nothing at all.

Congress cannot go along that way any further. It must deal with the problems of Presidential succession and Presidential inability by a constitutional amendment. It is necessary that the pertinent provision of the Constitution dealing with vacancy or inability, article II, section 1, that reads as follows:

In case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by law provide for the Case of Removal, Death, Resignation or Inability, both of the President and the Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

be amended to clarify whether the devolution is of the Office of the President or only of his powers and duties. Presumably it is the former in the case of death or resignation and the latter in case of inability. Be that as it may, it has been the uncertainty of construction of this language that in the past has prevented Vice Presidents from assuming authority during the periods of disability of various Presidents. Next, it is essential that the Constitution provide a means of dealing with the other matters encompassed in Senate Joint Resolution 1. But the amendment should not deal with details. They can be handled by statute and rightly should be.

This solution was well laid out before this committee last year and 2 years ago by the then Deputy Attorney General of the United States, Mr. Katzenbach. His entire statement in the 1963 hearings, incorporated again in the 1964 hearings, should be read by everyone who is considering this problem. Let me only emphasize his concluding thoughts:

Apart from the wisdom of loading the Constitution down by writing detailed procedural and substantive provisions into it has been questioned by many scholars and statesmen. The framers of the Constitution saw the wisdom of using broad and expanding concepts and principles that could be adjusted to keep pace with current needs. The changes are that supplemental legislation would be required in any event. In addition, crucial and urgent new situations may arise in the changing future—not covered by Senate Joint Resolution 28¹—where it may be of importance that Congress, with the President's approval, should be able to act promptly without being required to resort to still another amendment to the Constitution. Senate Joint Resolution 35¹ makes this possible; Senate Joint Resolution 28¹ does not.

Since it is difficult to foresee all of the possible circumstances in which the Presidential inability problem could arise, we are opposed to any constitutional amendment which attempts to solve all these questions by a series of complex procedures. We think that the best solution to the basic problems that remain would be a simple constitutional amendment, such as Senate Joint Resolution 35,¹ which treats the contingency of inability differently from situations such as death, removal, or resignation, which states that the Vice President in case of Presidential inability succeeds only to the powers and duties of the Office as Acting President and not to the Office itself, and which declares that the commencement and termination of any inability may be determined by such methods as Congress by law shall provide. Such an amendment would supply the flexibility which we think is indispensable and, at the same time, put to rest what legal problems may exist under the present provisions of the Constitution as supplemented by practice and understanding.

Senate Joint Resolution 35, referred to by Mr. Katzenbach, now the Attorney General, and modified in accordance with his suggestions reads as follows:

Article—

In case of the removal of the President from office or of his death or resignation, the said office shall devolve on the Vice President, in case of the inability of the President to discharge the powers and duties of the said office, the said powers and duties shall devolve on the Vice President as Acting President until the inability be removed. The Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice

¹88th Cong.

President, declaring what officer shall then be President, or in case of inability, act as President, and such officer shall be or act as President accordingly, until a President shall be elected or, in case of inability, until the inability shall be earlier removed. The commencement and termination of any inability may be determined by such method as Congress shall by law provide.

I, therefore, propose that we adopt as a constitutional amendment this proposal which not only bears the imprimatur of the two distinguished men who were then Members of the Senate, Senator Kefauver and Senator Keating, but which was so persuasively supported by the Attorney General. He has confirmed to me that he still holds those views. And in his testimony this year he said only that he would not insist on the preference he had expressed in the past.

But such a constitutional amendment would be only the beginning. We must then prepare specific legislation to establish the mechanics and the details of Presidential succession and inability. It could be in much the same language as that proposed by the Senator from Indiana for a constitutional amendment.

This course of action has one advantage above all others. It removes the fear that we may embed in the Constitution procedures which may not turn out to be workable. If they are in a statute we can change them. If they become a part of the Constitution, it would take another constitutional amendment to change them.

Indeed the events of the past few days have created a presumption and perhaps a conclusive presumption that a constitutional amendment in the form reported will be ill advised. In testimony before the Committee on the Judiciary of the other body, the Attorney General has given further indication of doubts he holds about the adequacy of the language of Senate Joint Resolution 1. Is section 3 permitting the President to declare his inability if he transmits a declaration in writing to the Senate and the House to be used when the President is having a tooth pulled? Is it to be used when he is out of the country on a visit to Mexico or to a NATO meeting, or perhaps when he is in the air at any time? If so, then we have imposed in the Constitution a very cumbersome procedure for him to take back his powers and duties. We have provided the same mechanics for an inability of a few minutes, or a few hours, as we have for long periods of illness.

Then, too, as has been suggested by those who have studied Senate Joint Resolution 1 in the form reported by the committee, there are many things which are not covered by the detailed language of this amendment which perhaps should be covered if we are going into such detail instead of adopting broad constitutional language which can be applied by statute to situations as they may arise. If one of the purposes of the amendment is to provide to the greatest extent possible for the filling of the Office of Vice President, have we done so? What happens if the President is disabled for many months and the Vice President assumes his powers and duties as Acting President? Can he appoint a Vice President, or must that Office remain empty? Surely there is as much chance that some ill may befall the mortal who is Acting President due to the disability of the President as there

would be if he succeeded to the Presidency upon the death of the President. By moving into this area with a constitutional amendment containing such specifics dealing with the one case we may have foreclosed ourselves from dealing by statute with other parts of the problem. On the other hand the broader language of Senate Joint Resolution 35, 88th Congress, would permit us to deal with this whole problem by statute.

And, let us never forget, that it is often argued that because situations of great variety and complexity may arise at any time in the conduct of our foreign relations and in the administration of the laws which we pass, we should not too tightly or too rigidly control the exercise of discretion by those who must deal with the problems. But by writing such specifics into the Constitution as are proposed by Senate Joint Resolution 1 as reported, we are even more tightly and more rigidly binding ourselves in dealing with the details of problems of Presidential succession and inability.

We should certainly heed the wisdom of the Attorney General when he testified on the merits of the various proposals last year and the year before. And we should give thought to the implications of all the assumptions the Attorney General felt constrained to make when he testified this year. Let us see what he said:

First, I assume that in using the phrase "majority vote of both Houses of Congress" in section 2, and "two-thirds vote of both Houses" in section 5, what is meant is a majority and two-thirds vote, respectively, of those Members in each House present and voting, a quorum being present. This interpretation would be consistent with longstanding precedent (see, e.g., *Missouri Pac. Ry. Co. v. Kansas*, 248 U.S. 276 (1919)).

Second, I assume that the procedure established by section 5 for restoring the President to the powers and duties of his office is applicable only to instances where the President has been declared disabled without his consent, as provided in section 4; and that, where the President has voluntarily declared himself unable to act, in accordance with the procedure established by section 3, he could restore himself immediately to the powers and duties of his office by declaring in writing that his inability has ended. The subcommittee may wish to consider whether language to insure this interpretation should be added to section 3.

Third, I assume that even where disability was established originally pursuant to section 4, the President could resume the powers and duties of his Office immediately with the concurrence of the Acting President, and would not be obliged to await the expiration of the 2-day period mentioned in section 5.

Fourth, I assume that transmission to the Congress of the written declarations referred to in section 5 would, if Congress were not then in session, operate to convene the Congress in special session so that the matter could be immediately resolved. In this regard, section 5 might be construed as impliedly requiring the Acting President to convene a special session in order to raise an issue as to the President's inability pursuant to section 5.

Further in this connection, I assume that the language used in section 5 to the effect that Congress "will immediately decide" the issue means that if a decision were not reached by the Congress immediately, the powers and duties of the Office would revert to the President. This construction is sufficiently doubtful, however, and the term "immediately" is sufficiently vague, that the subcommittee may wish to consider adding certainty by including more precise language in section 5 or by taking action looking toward the making of appropriate provision in the rules of the House and Senate.

In my testimony during the hearings of 1963, I expressed the view that the specific procedures for determining the commencement and termination of the President's inability should not be written into the Constitution, but instead should be left to Congress so that the Constitution would not be encumbered by detail.

The fact that we give heed and thought to these suggestions does not mean that we do nothing about the problem of presidential succession and disability. Indeed, we must do something. Let us do it with the sweep of history in our mind and pen rather than the shackles of specifics.

EVERETT MCKINLEY DIRKSEN.

INDIVIDUAL VIEWS OF SENATOR ROMAN L. HRUSKA

Agreements devised by the President and his Vice President in past administrations to cope with an inability crisis are not satisfactory solutions. Recent history has also made us very much aware of the need for filling the Office of Vice President when a vacancy arises.

It is abundantly clear that, rather than continue these informal agreements, the only sound approach is the adoption of a constitutional amendment.

The hearings, which have been held on this important subject in recent years and in which this Senator has had the opportunity to participate, have led me to prefer a different approach than the present one. As in other legislative matters, the finished product requires the refinement of individual preferences. In the spirit of this simple reality, I shall support the proposed amendment. It is my earnest hope that the Congress and the State legislatures will approve and ratify it promptly. There is, however, one amendment which I would urge, as discussed at a later point.

There are two major reasons for my acceptance of the proposed amendment.

The first is the urgent need for a solution. Differences of opinion in Congress have deprived us of a solution for far too long. It is time that these constitutional shortcomings be met.

Secondly, the proposed language approaches the product which would have resulted under the proposal which I had urged, so that this amendment is acceptable.

Nevertheless, it is in order to state the bases of my earlier preference and the preference of three Attorneys General.

The proposed amendment would distinguish the inability situation from the three other contingencies of permanent nature; death, resignation, and removal from office, and would recognize that, in the first instance, the Vice President becomes Acting President only.

At this point, we encounter the first major difference of opinion. Some would advocate spelling out the procedure for determining inability within the language of the proposed amendment. I disagree with the method of locking into the Constitution those procedures deemed appropriate today but which, in the light of greater knowledge and experience may be found wanting tomorrow.

The preferred course would be for the amendment to authorize the Congress to establish an appropriate procedure by law. This practice parallels the situation of Presidential succession, wherein the power is delineated by the Constitution but the detail is left for later determination.

I would also add one fundamental limitation to the process.

I refer to the doctrine of separation of powers. The maintenance of the three distinct branches of Government, coequal in character, has long been accepted as one of the most important safeguards for the preservation of the Republic.

The executive branch should determine the presence of and termination of the inability of the President. It is my view that a method which would involve neither the judicial nor the legislative branch of the Government would be the better course.

The determination of Presidential inability and its termination is obviously a factual matter. No policy is involved. The issue is simply whether a specific individual with certain physical, mental, or emotional impairments possesses the ability to continue as the Chief Executive or whether his infirmity is so serious and severe as to render him incapable of executing the duties of his Office.

Injecting Congress into the factual question of inability does create a secondary impeachment procedure, although limited, in which the conduct of the President would not be the test.

The impeachment trial of President Andrew Johnson affords a clear illustration of the dangers presented when Congress performs a judicial function. The intrigue and interplay within the Congress during the impeachment trial serves as a warning of clear and present dangers which exist when Congress is called upon to consider where to place the mantle of the presidential powers.

An additional compelling argument for restricting this authority to the executive branch is that this determination must be made with a minimum of delay. Although this objection has been alleviated in the present language, the executive branch is clearly best equipped to respond promptly as well as effectively in the face of such a crisis.

Obviously, such a decision must rest on the relevant and reliable facts regarding the President's physical or mental faculties. It must be divorced from any thoughts of political advantage, personal prejudice, or other extraneous factors. Those possessing such firsthand information about the Chief Executive, or most accessible to it on a personal basis, are found within the executive branch and not elsewhere.

We must be mindful that the President is chosen by the people of the entire Nation. It is their wish and their right that he serve as President for the term for which he was chosen. Every sensible and sympathetic construction favoring his continued performance of presidential duties should be accorded him. Indeed, were error to be committed, it should be in favor of his continuation in office or, were it interrupted by a disability, by his resumption of the office at the earliest possible moment upon recovery. The members of the executive branch are best situated to protect that interest.

What briefly has been developed is the basis of my view that Congress should not be injected into the decisionmaking process in cases of presidential inability or recovery.

Considerable reference has been made in the discussion of Senate Joint Resolution 1 to the 76 cosponsors of the proposed resolution. Cosponsorship of a proposal does not mean acceptance of detail and the exact text. I am certain that cosponsors do not consider themselves bound by a proposal as introduced. Cosponsorship does not indicate a desire to proceed without hearings, deliberation, and amendments in committee as well as on the floor of the Senate. Refinements made by the committee on this measure illustrate that whether a proposal has a single sponsor or 99 cosponsors, it must be examined in detail before it is considered by the Senate with a view to change by amendment or substitution.

The refinements that have been made on the original language of Senate Joint Resolution 1 will clarify the detailed procedure to be followed in a case of disability.

The role of Congress is narrow. It is as an appeal open to the President from the decision of the Vice President and the members of the Cabinet. It will be brought into the matter only in those limited circumstances where the Vice President, with a majority of the principal officers of the executive departments, and the President disagree on the question of inability. It is important to note that Congress will not have the power to initiate a challenge of the President's ability.

The procedure by which Congress shall act is properly left to later determination within rules of each branch thereof. A point of possible conflict is resolved in the understanding that Congress shall act as separate bodies and within their respective rules.

The language that "* * * Congress shall immediately proceed to decide the issue" leaves to Congress the determination of what, in light of the circumstances then existing, must be examined in deciding the issue. Thus, the matter will be examined on the evidence available. It is desirable that the matter be examined with a sympathetic eye toward the President who, after all, is the choice of the electorate.

It is apparent that Senate Joint Resolution 1 does have aspects which alleviate the dangers attendant to a crisis in presidential inability. Nevertheless, it is felt by this member of the committee that caution and restraint will be demanded should this inability measure be called into application.

A time does arrive, however, when we must fill the vacuum. The points which I have emphasized and previously insisted upon are important; but having a solution at this point is more than important, it is urgent. For this reason, I support Senate Joint Resolution 1 and urge its passage. I hope that it will be given expeditious approval by the other body and early ratification by the required number of States.

PROPOSED AMENDMENT

Section 5 gives the majority of the Cabinet and the Vice President only 2 days in which to challenge the President's declaration that his inability has terminated.

This is not enough time considering the gravity of the situation and the circumstances which might exist.

In the discharge of their duties, members of the Cabinet often travel widely. There are also long periods of time in which they may not have had an opportunity to observe and visit with the President so as to judge whether he has recovered sufficiently to resume his duties. Such periods of inaccessibility might even be longer, in the event of the President's illness.

The 2-day period should be extended to properly allow for these factors. I urge amendment of this point to provide additional time.

ROMAN L. HRUSKA.

PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT

MARCH 24, 1965.—Referred to the House Calendar and ordered to be printed

Mr. McCULLOCH, from the Committee on the Judiciary, submitted
the following

REPORT

[To accompany H.J. Res. 1]

The Committee on the Judiciary, to whom was referred the joint resolution (H.J. Res. 1) proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office, having considered the same, report favorably thereon with an amendment and recommend that the joint resolution do pass.

The amendment is as follows:

Strike all after the enacting clause and insert in lieu thereof the following:

That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

“Article —

“SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

“SEC. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

“SEC. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

“SEC. 4. Whenever the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit within two days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, immediately assembling for that purpose if not in session. If the Congress, within ten days after the receipt of the written declaration of the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office."

PURPOSE OF THE AMENDMENT

The principal purpose of the amendment is to distinguish between inability voluntarily declared by the President himself and inability declared without his consent. In the former case, the President can resume his duties by making a simple declaration that the inability has ceased; in the latter, the measure provides procedures for promptly determining the presence or absence of inability when that issue is present.

The amendment makes no changes in sections 1 and 2 of the constitutional amendment proposed by House Joint Resolution 1 as introduced; it does make changes in sections 3 and 4 and it eliminates section 5 by merging the substance of that section with that of section 4.

The changes made by the amendment in section 3 clarify the procedure and clarify the consequences when the President himself declares his inability to discharge the powers and duties of his office. There are two: First, the amendment indicates the officials to whom the President's written declaration of inability shall be transmitted, namely the President pro tempore of the Senate and the Speaker of the House of Representatives. The committee deemed it desirable to add this specification which was absent from the joint resolution as introduced. Second, the amendment makes clear that, in case of such voluntary self-disqualification by the President, the President's subsequent transmittal to the same officials of a written declaration to the contrary, i.e., a written declaration that no inability exists, terminates the Vice President's exercise of the Presidential powers and duties, and that the President shall thereupon resume them. In short, it is the intent of the committee that voluntary self-disqualification by the President shall be terminated by the President's own declaration that no inability exists, without further ado. To permit the Vice President and the Cabinet to challenge such an assertion of recovery might discourage a President from voluntarily relinquishing his powers in case of illness. The right of challenge would be reserved for cases in which the Vice President and Cabinet, without the President's consent, had found him unable to discharge his powers and duties.

Sections 4 and 5 of the amendment proposed by House Joint Resolution 1, as introduced, dealt respectively with the devolution upon the Vice President, as Acting President, of the President's powers and

duties pursuant to a declaration of his inability made by the Vice President and other officials, and with the procedure upon subsequent declaration by the President that no inability exists.

The amendment places the substance of former section 5 into section 4, in order to emphasize the committee's intent that the procedure provided by former section 5 relates only to cases in which Presidential inability has been declared by others than the President. Two identical changes are made in former sections 4 and 5. First, the term "principal officers of the executive departments" is substituted for the term "heads of the executive departments" to make it clearer that only officials of Cabinet rank should participate in the decision as to whether presidential inability exists. The substituted language follows more closely article II, section 2, of the Constitution, which provides that the President may require the opinion in light "of the principal officers in each of the executive departments * * *." The intent of the committee is that the Presidential appointees who direct the 10 executive departments named in 5 U.S.C. 1, or any executive department established in the future, generally considered to comprise the President's Cabinet, would participate, with the Vice President, in determining inability. In case of the death, resignation, absence, or sickness of the head of any executive department, the acting head of the department would be authorized to participate in a presidential inability determination.

The second change made in former sections 4 and 5 is to specify the President pro tempore of the Senate and the Speaker of the House of Representatives as the congressional officials to whom declaration concerning Presidential inability shall be transmitted, as is done in section 3.

The language of former section 5 of House Joint Resolution 1 is further amended to make clear that if Congress is not in session at the time of receipt by the President pro tempore of the Senate and the Speaker of the House of Representatives of a written declaration by the Vice President and a majority of the principal officers of the executive departments contradicting a Presidential declaration that no inability exists, Congress shall immediately assemble for the purpose of deciding the issue. Finally, the language of former section 5 is further amended by providing that in such event the President shall resume the powers and duties of his office unless the Congress within 10 days after receipt of such declaration of Presidential inability determines by two-thirds vote of both Houses that the President is in fact unable to discharge the powers and duties of his office.

The committee deems it essential in the interest of stability of government to limit to the smallest possible period the time during which the vital issue of the executive power can remain in doubt. Under the bill, following a Presidential declaration that the disability previously declared by others no longer exists, a challenge to such declaration must be made within 2 days of its receipt by the heads of the Houses of Congress and must be finally determined within the following 10 days. Otherwise the President, having declared himself able, will resume his powers and duties. An unlimited power in Congress might afford an irresistible temptation to temporize with respect to restoring the President's powers. In this highly charged area there is no room for equivocation or delay.

STATEMENT

For its report herein the committee adopts in substantial measure the report of the Senate Committee on the Judiciary to accompany Senate Joint Resolution 1, namely, Senate Report No. 66, 89th Congress, 1st session:

The constitutional provisions

The Constitution of the United States, in article II, section 1, clause 5, contains provisions relating to the continuity of the Executive power at times of death, resignation, inability, or removal of a President. No replacement provision is made in the Constitution where a vacancy occurs in the office of the Vice President. Article II, section 1, clause 5, reads as follows:

In Case of the Removal of the President from Office, or at his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

This is the language of the Constitution as it was adopted by the Constitutional Convention upon recommendation of the Committee on Style. When this portion of the Constitution was submitted to that Committee it read as follows:

In case of his (the President's) removal as aforesaid, death, absence, resignation, or inability to discharge the powers of duties of his office, the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.

The Legislature may declare by law what officer of the United States shall act as President, in case of the death, resignation, or disability of the President and Vice President; and such officer shall act accordingly, until such disability be removed, or a President shall be elected.

While the Committee on Style was given no authority to change the substance of prior determinations of the Convention, it is clear that this portion of the draft which that Committee ultimately submitted was a considerable alteration of the proposal which the Committee had received.

The inability clause and the Tyler precedent

The records of the Constitutional Convention do not contain any explicit interpretation of the provisions as they relate to inability. As a matter of fact, the records of the Convention contain only one apparent reference to the aspects of this clause which deal with the question of disability. It was Mr. John Dickinson, of Delaware, who, on August 27, 1787, asked:

What is the extent of the term "disability" and who is to be the judge of it? (Farrand, "Records of the Constitutional Convention of 1787," vol. 2, p. 427.)

The question is not answered so far as the records of the Convention disclose.

It was not until 1841 that this clause of the Constitution was called into question by the occurrence of one of the listed contingencies. In that year President William Henry Harrison died, and Vice President John Tyler faced the determination as to whether, under this provision of the Constitution, he must serve as Acting President or whether he became the President of the United States. Vice President Tyler gave answer by taking the oath as President of the United States. While this evoked some protest at the time, noticeably that of Senator William Allen, of Ohio, the Vice President (Tyler) was later recognized by both Houses of Congress as President of the United States (Congressional Globe, 27th Cong., 1st sess., vol. 10, pp. 3-5, May 31-June 1, 1841).

This precedent of John Tyler has since been confirmed on seven occasions when Vice Presidents have succeeded to the Presidency of the United States by virtue of the death of the incumbent President. Vice Presidents Fillmore, Johnson, Arthur, Theodore Roosevelt, Coolidge, Truman, and Lyndon Johnson all became President in this manner.

The acts of these Vice Presidents, and the acquiescence in, or confirmation of, their acts by Congress have served to establish a precedent that, in one of the contingencies under article II, section 1, clause 5, that of death, the Vice President becomes President of the United States.

The clause which provides for succession in case of death also applies to succession in case of resignation, removal from office, or inability. In all four contingencies, the Constitution states: "the same shall devolve on the Vice President."

Thus it is said that whatever devolves upon the Vice President upon death of the President, likewise devolves upon him by reason of the resignation, inability, or removal from office of the President. (Theodore Dwight, "Presidential Inability," North American Review, vol. 133, p. 442 (1919).)

The Tyler precedent, therefore, has served to cause doubt on the ability of an incapacitated President to resume the functions of his office upon recovery. Professor Dwight, who later became president of Yale University, found further basis for this argument in the fact that the Constitution, while causing either the office, or the power and duties of the office, to "devolve" upon the Vice President, is silent on the return of the office or its functions to the President upon recovery. Where both the President and Vice President are incapable of serving, the Constitution grants Congress the power to declare what officer shall act as President "until the disability is removed."

These considerations apparently moved persons such as Daniel Webster, who was Secretary of State when Tyler took office as President, to declare that the powers of the office are inseparable from the office itself and that a recovered President could not displace a Vice President who had assumed the prerogatives of the Presidency. This interpretation gains support by implication from the language of article I, section 3, clause 5, of the Constitution which provides that:

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the *office* of President of the United States. [*Italic supplied.*]

The doubt engendered by precedent was so strong that on two occasions in the history of the United States it has contributed materially to the failure of Vice Presidents to assume the office of President at a time when a President was disabled. The first of these occasions arose in 1881 when President Garfield fell victim of an assassin's bullet. President Garfield lingered for some 80 days during which he performed but one official act, the signing of an extradition paper. There is little doubt but that there were pressing issues before the executive department at that time which required the attention of a Chief Executive. Commissions were to be issued to officers of the United States. The foreign relations of this Nation required attention. There was evidence of mail frauds involving officials of the Federal Government. Yet only such business as could be disposed of by the heads of Government departments, without Presidential supervision, was handled. Vice President Arthur did not act. Respected legal opinion of the day was divided upon the ability of the President to resume the duties of his office should he recover. (See opinions of Lyman Trumbull, Judge Thomas Cooley, Benjamin Butler, and Prof. Theodore Dwight, "Presidential Inability, *North American Review*," vol. 133, pp. 417-446 (1881).)

The division of legal authority on this question apparently extended to the Cabinet, for newspapers of that day, notably the *New York Herald*, the *New York Tribune*, and the *New York Times* contain accounts stating that the Cabinet considered the question of the advisability of the Vice President acting during the period of the President's incapacity. Four of the seven Cabinet members were said to be of the opinion that there could be no temporary devolution of Presidential power on the Vice President. This group reportedly included the then Attorney General of the United States, Mr. Wayne MacVeagh. All of Garfield's Cabinet were of the view that it would be desirable for the Vice President to act but since they could not agree upon the ability of the President to resume his office upon recovery, and because the President's condition prevented them from presenting the issue to him directly the matter was dropped.

It was not until President Woodrow Wilson suffered a severe stroke in 1919 that the matter became one of pressing urgency again. This damage to President Wilson's health came at a time when the struggle concerning the position of the United States in the League of Nations was at its height. Major matters of foreign policy such as the Shantung Settlement were unresolved. The British Ambassador spent 4 months in Washington without being received by the President. Twenty-eight acts of Congress became law without the President's signature (Lindsay Rogers, "Presidential Inability, the Review," May 8, 1920; reprinted in 1958 hearings before Senate Subcommittee on Constitutional Amendments, pp. 232-235). The President's wife and a group of White House associates acted as a screening board on decisions which could be submitted to the President without impairment of his health. (See Edith Bolling Wilson, "My Memoirs," pp. 288-290; Hoover, "Forty-two Years in the White House," pp. 105-106; Tumulty, "Woodrow Wilson as I Know Him," pp. 437-438.)

As in 1881, the Cabinet considered the advisability of asking the Vice President to act as President. This time, there was considerable opposition to the adoption of such procedure on the part of assistants the President. It has been reported by a Presidential secretary

of that day that he reproached the Secretary of State for suggesting such a possibility (Joseph P. Tumulty, "Woodrow Wilson as I Know Him," pp. 443-444). Upon the President's ultimate recovery, the President caused the displacement of the Secretary of State for reasons of alleged disloyalty to the President (Tumulty, "Woodrow Wilson as I Know Him," pp. 444-445).

On three occasions during the Eisenhower administration, incidents involving the physical health of the President served to focus attention on the inability clause.

President Eisenhower became concerned about the gap in the Constitution relative to Presidential inability, and he attempted to reduce the hazards by means of an informal agreement with Vice President Nixon. The agreement provided:

1. In the event of inability the President would, if possible, so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.

2. In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the office and would serve as Acting President until the inability had ended.

3. The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the office.

President Kennedy entered into a similar agreement with Vice President Johnson as did President Johnson with Speaker John McCormack and Vice President Hubert Humphrey. Such informal agreements cannot be considered an adequate solution to the problem because: (A) Their operation would differ according to the relationship between the particular holders of the offices; (B) a private agreement cannot give the Vice President clear authority to discharge powers conferred on the President by the Constitution, treaties, or statutes; (C) no provision is made for the situation in which a dispute exists over whether or not the President is disabled. Former Attorneys General Brownell and Rogers as well as Attorney General Kennedy agree that the only definitive method to settle the problem is by means of a constitutional amendment.

THE NEED FOR CHANGE

The historical review of the interpretation of article II, section 1, clause 5, suggests the difficulties which it has already presented. The language of the clause is unclear, its application uncertain. The clause couples the contingencies of a permanent nature such as death, resignation, or removal from office, with inability, a contingency which may be temporary. It does not clearly commit the determination of inability to any individual or group, nor does it define inability so that the existence of such a status may be open and notorious. It leaves uncertain the capacity in which the Vice President acts during a period of inability of the President. It fails to define the period during which the Vice President serves. It does not specify that a recovered President may regain the prerogatives

of his office if he has relinquished them. It fails to provide any mechanism for determining whether a President has in fact recovered from his inability, nor does it indicate how a President, who sought to recover his prerogatives while still disabled, might be prevented from doing so.

The resolution of these issues is imperative if continuity of Executive power is to be preserved with a minimum of turbulence at times when a President is disabled. Continuity of Executive authority is more important today than ever before. The concern which has been manifested on previous occasions when a President was disabled, is increased when the disability problem is weighed in the light of the increased importance of the Office of the Presidency to the United States and to the world.

This increased concern has in turn manifested an intensified examination of the adequacy of the provisions relating to the orderly transfer of the functions of the Presidency. Such an examination is not reassuring. The constitutional provision has not been utilized because its procedures have not been clear. After 175 years of experience with the Constitution the inability clause remains an untested provision of uncertain application.

METHOD OF CHANGE

In previous instances in history when this question has arisen, one of the major considerations has been whether Congress could constitutionally proceed to resolve the problem by statute, or whether an enabling constitutional amendment would be necessary. As early as 1920, when the Committee on the Judiciary of the House of Representatives, 66th Congress, 2d session, considered the problem, Representatives Madden, Rogers, and McArthur took the position that the matter of disability could be dealt with by statute without an amendment to the Constitution, whereas Representative Fess was of the opinion that Congress was not authorized to act under the Constitution, and that an amendment would first have to be adopted (hearings before the Committee on the Judiciary, House of Representatives, February 26 and March 1, 1920). Through the years, this controversy has increased in intensity among Congressmen and constitutional scholars who have considered the Presidential inability problem.

Those who feel that Congress does not have the authority to resolve the matter by statute claim that the Constitution does not support a reasonable inference that Congress is empowered to legislate. They point out that article II, section 1, clause 5, of the Constitution authorized Congress to provide by statute for the case where both the President and Vice President are incapable of serving. By implication Congress does not have the authority to legislate with regard to the situation which concerns only a disabled President, with the Vice President succeeding to his powers and duties. Apparently this is the proper construction, because the first statute dealing with Presidential succession under article II, section 1, clause 6, which was enacted by contemporaries of the framers of the Constitution, did not purport to establish succession in instances where the President alone was disabled (act of March 1, 1792, 1 Stat. 239).

Serious doubts have also been raised as to whether the "necessary and proper" authority of article I, section 8, clause 18, gives the Congress the power to legislate in this situation. The Constitution does not vest any department or office with the power to determine inability, or to decide the term during which the Vice President shall act, or to determine whether and at what time the President may later regain his prerogatives upon recovery. Thus it is difficult to argue that article I, section 8, clause 18, gives the Congress the authority to make all laws which shall be necessary and proper for carrying out such powers.

In recent years, there seems to have been a strong shift of opinion in favor of the proposition that a constitutional amendment is necessary, and that a mere statute would not be adequate to solve the problem. The last three Attorneys General who have testified on the matter, Herbert Brownell, William P. Rogers, and Acting Attorney General Nicholas deB. Katzenbach, have agreed an amendment is necessary. In addition to the American Bar Association and the American Association of Law Schools, the following organizations have agreed an amendment is necessary: the State bar associations of Arizona, Arkansas, California, Colorado, Connecticut, Hawaii, Indiana, Iowa, Kansas, Louisiana, Michigan, Ohio, Rhode Island, Texas, Virginia, Vermont; and the bar associations of Denver, Colo.; the District of Columbia; Dade County, Fla.; city of New York; Passaic County, N.J.; Greensboro, N.C.; York County, Pa.; and Milwaukee, Wis.

The most persuasive argument in favor of amending the Constitution is that so many legal questions have been raised about the authority of Congress to act on this subject without an amendment that any statute on the subject would be open to criticism and challenge at the most critical time—that is, either when a President had become disabled, or when a President sought to recover his office. Under these circumstances, there is an urgent need to adopt an amendment which would distinctly enumerate the proceedings for determination of the commencement and termination of disability.

Filling of vacancies in the office of the President

While the records of the Constitutional Convention disclosed little insight on the framers' interpretation of the inability provisions of the Constitution, they do reveal that wide disagreement prevailed concerning whether or not a Vice President was needed. If he was needed, what were to be his official duties, if any.

The creation of the office of Vice President came in the closing days of the Constitutional Convention. Although such a position was considered very early in the Convention, later proposals envisaged the President of the Senate, the Chief Justice, and even a council of advisers, as persons who would direct the executive branch should a lapse of Executive authority come to pass.

On September 4, 1787, a Committee of Eleven, selected to deliberate those portions of the Constitution which had been postponed, recommended that an office of Vice President be created and that he be elected with the President by an electoral college. On September 7, 1787, the Convention discussed the Vice-Presidency and the duties to be performed by the occupant of the Office. Although much deliberation ensued regarding the official functions of the office, little

thought seems to have been given to the succession of the Vice President to the office of President in case of the death of the President.

A committee, designated to revise the style of and arrange the articles agreed to by the House, returned to Convention on September 12, 1787, a draft which for all practical purposes was to become the Constitution of the United States. It contemplated two official duties for the Vice President: (1) to preside over the Senate, in which capacity he would vote when the Senate was "equally divided" and open the certificates listing the votes of the presidential electors, and (2) to discharge the powers and duties of the President in case of his death, resignation, removal, or inability.

While the Constitution does not address itself in all cases to specifics regarding the Vice President as was the case for the President, the importance of the office in view of the Convention is made apparent by article II, section 1, clause 3. This clause, the original provision for the election of the President and the Vice President, made it clear that it was designed to insure that the Vice President was a person equal in stature to the President.

The intent of the Convention, however, was totally frustrated when the electors began to distinguish between the two votes which article II, section 1, clause 3 had bestowed upon them. This inherent defect was made painfully apparent in the famous Jefferson-Burr election contest of 1800, and in 1804 the 12th amendment modified the college voting to prevent a reoccurrence of similar circumstances.

There is little doubt the 12th amendment removed a serious defect from the Constitution. However, its passage, coupled with the growing political practice of nominating Vice Presidents to appease disappointed factions of the parties, began a decline that was in ensuing years to mold the Vice-Presidency into an office of inferiority and disparagement.

Fortunately, this century saw a gradual resurgence of the importance of the Vice-Presidency. He has become a regular member of the Cabinet, Chairman of the National Aeronautics and Space Council, Chairman of the President's Committee on Equal Employment Opportunities, a member of the National Security Council, and a personal envoy for the President. He has in the eyes of Government regained much of the "equal stature" which the framers of the Constitution contemplated he should entertain.

THE URGENCY OF AMENDMENT

The death of President Kennedy and the accession of President Johnson in 1963 pointed up once again the abyss which exists in the executive branch when there is no incumbent Vice President. Sixteen times the United States of America has been without a Vice President, totaling 37 years during our history.

As has been pointed out, the Constitutional Convention in its wisdom foresaw the need to have a qualified and able occupant of the Vice President's office should the President die. They did not, however, provide the mechanics whereby a Vice-Presidential vacancy could be filled.

The considerations which enter into a determination of whether provisions for filling the office of Vice President when it becomes vacant should be made by simple legislation or require a constitutional

amendment are similar to those which enter into the same kind of determination about Presidential inability provisions. In both cases, there is some opinion that Congress has authority to act. However, the arguments that an amendment is necessary are strong and supported by many individuals. We must not gamble with the constitutional legitimacy of our Nation's executive branch. When a President or a Vice President of the United States assumes his office, the entire Nation and the world must know without doubt that he does so as a matter of right. Only a constitutional amendment can supply the necessary air of legitimacy.

The argument that Congress can designate a Vice President by law is at best a weak one. The power of Congress in this regard is measured principally by article II, section 1, clause 6, which states that—

the Congress may by law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the Disability be removed, or a President shall be elected.

This is not in specific terms a power to declare what officer shall be Vice President. It is a power to declare upon what officer the duties and powers of the office of President shall devolve when there is neither President nor Vice President to act.

To stand by ready for the powers and duties of the Presidential office to devolve upon him at the time of death or inability of the President, is the principal constitutional function of the Vice President. It is clear that Congress can designate the officer who is to perform that function when the office of Vice President is vacant. Indeed it has done so in each of the Presidential Succession Acts. Should there be any more objection to designating that officer Vice President than there is to designating as President the Vice President upon whom devolve the powers and duties of a deceased President, for which designation there is no specific constitutional authorization?

The answer to that question is "Yes." The Constitution has given the Vice President another duty and sets forth specific instructions as to who is to perform it in his absence. Article I, section 2, clause 4, provides that the Vice President shall be the President of the Senate and clause 5 provides that the Senate shall choose its other officers including a "President pro Tempore, in the Absence of the Vice President or when he shall exercise the Office of the President of the United States." It is very difficult to argue that a person designated Vice President by Congress, or selected in any way other than by the procedures outlined in amendments 12 and 22, can be the President of the Senate.

One of the principal reasons for filling the office of Vice President when it becomes vacant is to permit the person next in line to become familiar with the problems he will face should he be called upon to act as President, e.g., to serve on the National Security Council, head the President's Committee on Equal Employment Opportunity, participate in Cabinet meetings and take part in other top-level discussions which lead to national policymaking decisions. Those who consider a law sufficient to provide for filling a Vice Presidential vacancy point out that the Constitution says nothing about such duties and there is therefore nothing to prevent Congress from assigning these duties to

the officer it designates as next in line in whatever Presidential succession law it enacts. Regardless of what office he held at the time of his designation as Vice President, however, he would have a difficult time carrying out the duties of both offices at the same time.

When, to all these weaknesses, one adds the fact that no matter what laws Congress may write describing the duties of the officer it designates to act as Vice President, the extent to which the President takes him into his confidence or shares with him the deliberations leading to executive decisions is to be determined largely by the President rather than by statute, practical necessity would seem to require not only that the procedure for determining who fills the Vice Presidency when it becomes vacant be established by constitutional amendment but that the President be given an active role in the procedure whatever it be.

Finally, as in the case of inability, the most persuasive argument in favor of amending the Constitution is the division of authority concerning the authority of Congress to act on this subject. With this division in existence it would seem that any statute on the subject would be open to criticism and challenge at a time when absolute legitimacy was needed.

ANALYSIS

Inability

The proposal now being submitted is cast in the form of a constitutional amendment for the reasons which have been outlined earlier.

Article II, section 1, clause 5, of the Constitution is unclear on two important points. The first is whether the "office" of the President or the "powers and duties of the said office" devolve upon the Vice President in the event of Presidential inability. The second is who has the authority to determine what inability is, when it commences, and when it terminates. Senate Joint Resolution 1 resolves both questions.

The first section would affirm the historical practice by which a Vice President has become President upon the death of the President, further extending the practice to the contingencies of resignation or removal from office. It separates the provisions relating to inability from those relating to death, resignation, or removal, thereby eliminating any ambiguity in the language of the present provision in article II, section 1, clause 5.

Sections 3 and 4 embrace the procedures for determining the commencement and termination of Presidential inability.

Section 3 lends constitutional authority to the practice that has heretofore been carried out by informal agreements between the President and the person next in the line of succession. It makes clear that the President may declare in writing his disability and that upon such an occurrence the Vice President becomes Acting President. By establishing the title of Acting President the proposal makes clear that it is not the "office" but the "powers and duties of the office" that devolve on the Vice President and further clarifies the status of the Vice President during the period when he is discharging the powers and duties of a disabled President.

The amendment to section 3 makes certain that in cases in which a President himself declares his inability, the period of his disability would be terminated by a simple Presidential notice to both Houses

of Congress. To permit the Vice President and Cabinet to challenge such an assertion of recovery might discourage a President from voluntarily relinquishing his powers in case of illness. The right of challenge would be reserved for cases in which the Vice President and the Cabinet, without the President's consent, had found him unable to discharge his powers and duties.

Section 4 of the proposed constitutional amendment deals with the most difficult problem of inability—the factual determination of whether or not inability exists. It provides that whenever the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

The final success of any constitutional arrangement to secure continuity in cases of inability must depend upon public opinion with a possession of a sense of "constitutional morality." Without such a feeling of responsibility there can be no absolute guarantee against usurpation. No mechanical or procedural solution will provide a complete answer if one assumes hypothetical cases in which most of the parties are rogues and in which no popular sense of constitutional propriety exists. It seems necessary that an attitude be adopted that presumes we shall always be dealing with "reasonable men" at the highest governmental level. The combination of the judgment of the Vice President and a majority of the Cabinet members appears to furnish the most feasible formula without upsetting the fundamental checks and balances between the executive, legislative, and judicial branches. It would enable prompt action by the persons closest to the President, both politically and physically, and presumably most familiar with his condition. It is assumed that such decision would be made only after adequate consultation with medical experts who were intricately familiar with the President's physical and mental condition.

There are many distinguished advocates for a specially constituted group in the nature of a factfinding body to determine presidential inability rather than the Cabinet. However, such a group would face many dilemmas. If the President is so incapacitated that he cannot declare his own inability the factual determination of inability would be relatively simple. No need would exist for a special factfinding body. Nor is a factfinding body necessary if the President can and does declare his own inability. If, however, the President and those around him differ as to whether he does suffer from an inability which he is unwilling to admit, then a critical dispute exists. But this dispute should not be determined by a special commission composed of persons outside the executive branch. Such a commission runs a good chance of coming out with a split decision. What would be the effect, for example, if a commission of seven voted four to three that the President was fit and able to perform his office? What power could he exert during the rest of his term when, by common knowledge, a change of one vote in the commission proceedings could yet deny him the right to exercise the powers of his office? If the vote were the other way and the Vice President were installed as Acting President,

what powers could he exert when everyone would know that one vote the other way could cause his summary removal from the exercise of Presidential powers? If the man acting as President were placed in this awkward, completely untenable and impotent position, the effect on domestic affairs would be bad enough; the effect on the international position of the United States might well be catastrophic.

However, in the interest of providing flexibility for the future, the amendment would authorize the Congress to designate a different body if this were deemed desirable in light of subsequent experience.

The second paragraph of section 4 of the proposed amendment would permit the President to resume the powers and duties of the office upon his transmission to the President of the Senate and the Speaker of the House of Representatives of his written declaration that no inability existed. However, should the Vice President and a majority of the principal officers of the executive departments feel that the President is unable, then they could prevent the President from resuming the powers and duties of the office by transmitting their written declaration so stating to the President of the Senate and the Speaker of the House of Representatives within 2 days. Once the declaration of the President stating no inability exists has been transmitted to the President of the Senate and the Speaker of the House of Representatives, then the issue is squarely joined. At this point the proposal recommends that the Congress shall make the final determination on the existence of inability. If within 10 days the Congress determines by a two-thirds vote of both Houses that the President is unable, then the Vice President continues as Acting President. However, should the Congress fail in any manner to cast a vote of two-thirds or more in both Houses supporting the position that the President was unable to perform the powers and duties of his office, then the President would resume after the expiration of 10 days the powers and duties of the office. The recommendation for a vote of two-thirds is in conformity with the provision of article I, section 3, clause 6, of the Constitution relating to impeachments. The committee contemplates that votes taken pursuant to the provisions of the proposed constitutional amendment will be conducted in accordance with the rules of the House and Senate, respectively, and that record votes may be taken when in conformity with such rules.

This proposal achieves the goal of an immediate original transfer in Executive authority and the resumption of it in consonance both with the original intent of the framers of the Constitution and with the balance of powers among the three branches of our Government which is the permanent strength of the Constitution.

Vacancies

Section 2 is intended to virtually assure us that the Nation will always possess a Vice President. It would require a President to nominate a person who meets the existing constitutional qualifications to be Vice President whenever a vacancy occurred in that office. The nominee would take office as Vice President once he has been confirmed by a majority vote in both Houses of the Congress.

In considering this section of the proposal, it was observed that the office of the Vice President has become one of the most important positions in our country. The days are long past when it was largely honorary and of little importance, as has been previously pointed out.

For more than a decade the Vice President has borne specific and important responsibilities in the executive branch of Government. He has come to share and participate in the executive functioning of our Government, so that in the event of tragedy there would be no break in the informed exercise of executive authority. Never has this been more adequately exemplified than by the uninterrupted assumption of the Presidency by Lyndon B. Johnson.

It is without contest that the procedure for the selection of a Vice President must contemplate the assurance of a person who is compatible with the President. The importance of this compatibility is recognized in the modern practice of both major political parties in according the presidential candidate a major voice in choosing his running mate subject to convention approval. This proposal would permit the President to choose his Vice President subject to congressional approval. In this way the country would be assured of a Vice President of the same political party as the President, someone who would presumably work in harmony with the basic policies of the President.

The committee recommends adoption of the joint resolution as amended.

COMMITTEE AMENDMENTS TO HOUSE JOINT RESOLUTION 1 SHOWING OMISSIONS, NEW MATTER, AND RETAINED WORDING

The committee amendments to the House joint resolution are shown as follows: Provisions of the resolution as introduced which are omitted are enclosed in black brackets, new matter is printed in italic, provisions in which no change is proposed are shown in roman.

Article—

SECTION 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

SEC. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

SEC. 3. **【If the President declares in writing】** *Whenever the President transmits to the President Pro Tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits a written declaration to the contrary,* such powers and duties shall be discharged by the Vice President as Acting President.

SEC. 4. **【If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his】** *Whenever the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit to the President Pro Tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is*

unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

■ [SEC. 5.] *Thereafter, when [ever] the President transmits to the [Congress] President Pro Tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, [with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his] and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit within two days to the President Pro Tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall [immediately] decide the issue, immediately assembling for that purpose if not in session. If the Congress, within ten days after the receipt of the written declaration of the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.*

ADDITIONAL VIEWS OF REPRESENTATIVE EDWARD HUTCHINSON

House Joint Resolution 1, as reported, would ratify the Tyler precedent of succession to the office of President by the Vice President upon the death of the President; it would provide for filling a vacancy in the office of Vice President; and it would incorporate into the Constitution a detailed procedure for the transfer of Executive power from the President to the Vice President in times of the President's inability to discharge the powers and duties of his office.

THE TYLER PRECEDENT

No reasonable question any longer exists about the constitutional succession to the office of President by the Vice President upon the death of the President. Vice President Tyler's claim to the office as well as its powers and duties, upon the death of President W. H. Harrison in 1841, has without exception been asserted on every subsequent like occasion. The country would not now accept any different construction of the constitutional provision, nor would any different construction be warranted. There is no disagreement over section 1 of House Joint Resolution 1. It makes clear that whenever a vacancy in the office of President occurs, whether by removal, death or resignation, the Vice President will assume the office as well as its powers and duties.

FILLING A VICE-PRESIDENTIAL VACANCY

Section 2 of House Joint Resolution 1 would empower and direct the President to nominate a Vice President when that office is vacant, and the citizen so nominated would take office when confirmed by a majority vote of both Houses of Congress.

While it is generally assumed each House would act separately, the language employed requires a majority vote of both Houses, not each House, to confirm. If, sometime in the future, pressure is brought to bear for congressional confirmation in joint convention, as some proponents of this measure now advocate, the language of section 2 may be construed to require only a majority of both Houses combined, in that way diluting the vote of Senators. In my opinion, this possibility would be lessened if the language directed the majority vote in each House instead of a majority vote of both Houses.

Although the section is silent on the point, it is expected that the majority vote required, so long as each House acts separately, is a majority of the votes cast in each House, a quorum being present. There is no requirement for a record vote, but one-fifth of those present could require it. A secret ballot could not be ordered over their objections.

Procedure for confirmation of nominations by the President by both Houses is unique in our experience. All other appointments are

submitted only to the Senate, for advice and consent. A good case could be made for submission of this nomination to the Senate alone. After all, the sole constitutional duty of the Vice President remains that of President of the Senate; and within the purview of the Constitution, the President, by nominating a Vice President, is choosing their Presiding Officer. Senate approval of his nominee, as in the case of other Presidential appointments, certainly would have been thought sufficient in earlier periods of our history, and may be sufficient today.

The case for Senate action alone also can be buttressed by an analogy. In those cases where a Vice President is not elected, because of a failure of a majority of the electoral vote, the Constitution directs the Senate to elect one from the candidates who received the two highest numbers.

Finally, in the case for Senate confirmation alone, it may be observed that our constitutional processes for the selection of our Presidents and Vice Presidents are Federal in nature. Presidential electors, chosen in each State in such manner as the legislature may direct, meet in their respective States and there cast the votes to which their State is entitled. The Senate, too, is a body Federal in nature. Each State has an equal vote in the Senate. The Senate represents the States in our legislative branch. It would be wholly consistent with the preservation of the Federal structure if the Senate were vested with power either to elect a Vice President to fill a vacancy, or to advise and consent to the nomination of the President for that purpose.

Thus far in our history there has been a vacancy in the office of Vice President during a part of 16 different terms. One vacancy was caused by resignation of the Vice President. Seven died in office and the other eight succeeded to the Presidency upon the death of the President.

On those occasions when the Vice President's office becomes vacant through removal, death, or resignation, it is possible that some division in Congress might occur over confirmation of a President's nomination of a successor. But on those occasions when a vacancy is due to a Vice President's succession to the Presidency, and the new President, so recently a Vice President himself, is called upon to nominate another, the temper of the country and of the Congress is likely to be such as to make congressional confirmation of the appointment *pro forma*. Under such circumstances, how meaningful really is the function of congressional confirmation? The new President might as well be empowered to appoint a new Vice President outright.

Consider the terrible pressures that will immediately come to bear on a newly elevated President to choose a Vice President. No time is specified within which the nomination must be made, but it would be a mistake to believe the new President could relieve the pressure by putting the matter off. As soon as he enters the presidential stage, the new President will see prospective Vice Presidents and their supporters in the wings. In addition to all of the other cares, duties, and responsibilities thrust upon him, he will also have to deal with those who aspire to the second highest office of the land—the largest plum within his hands.

A better solution to the problem of succession to the office of Vice President would be to provide that the holder of some other office in

the administration should automatically succeed to the Vice Presidency.

It is hard enough for the country to go through the sad experience of a change of administration at the time of the death of a President, when the succession is automatic. That is the situation now and as it has been. Since 1792 there has always been a known successor to the office of President when there was no Vice President. But upon the ratification of this proposed amendment, there will be an air of uncertainty, at least for the time during which it takes a new President to nominate and obtain confirmation of his choice—and this uncertainty will be experienced at a time when the country can least bear it.

PRESIDENTIAL INABILITY

House Joint Resolution 1 would incorporate into the Constitution a detailed procedure for the transfer of Executive power from the President to the Vice President in times of the President's inability to discharge the powers and duties of his office. Such transfer can occur with the President's consent or over his protest. The language of the resolution offers no hint that the determination of inability shall be based on medical or psychiatric evidence. Instead, the determination will be a political one; and here lies a danger in the proposal.

Words written into the Constitution in the past are now found to have vested powers to extents and in ways not intended by their authors. We should be extremely careful, lest we unwittingly provide tools of power we would ourselves oppose.

Do the provisions of section 4 of this resolution in effect create a new way in which a President might be removed from office? Might it be possible for a Vice President, sometime in the future, to form a cabal with a majority of the President's Cabinet and size power from him? Are we, by incorporating these words into the Constitution, providing the machinery by which the stability of the office of President might be undermined? All it takes, under section 4, is for the Vice President and a majority of the Cabinet to file their written declaration of the President's inability with the President pro tempore of the Senate and the Speaker of the House, and the Vice President becomes Acting President. Then the President, dislodged by this maneuver from his awesome powers, is put in the position of having to win back his position by persuading Congress of his fitness. Here again the decision will be a political one. There is no suggestion that medical or psychiatric evidence even be considered. And, if an unpopular President should fail to find support among at least a third of the Senators and Representatives in Congress, he would continue in name only, shorn of his powers and duties. He could apparently make repeated attempts to regain the powers of his office until his term expires. Would these circumstance lend stability to the country or undermine it?

On the other hand, suppose an unpopular President is upheld by the Congress with more than one-third, but less than a majority of the Members sustaining his contention of ability to serve. Is it not possible the same cabal might try again? The President would break it up, if possible, by changes in his Cabinet, providing he could win the advice and consent of the Senate for his new appointees, but under such circumstances he might not obtain confirmation of his

Cabinet changes. Would these circumstances tend to lend stability to the Government or undermine it?

Other assumptions might be made to illustrate further how the machinery we now offer the country might sometime be used by men ambitious for power.

We should keep in mind that we are fashioning tools which could be used to unsettle the stability of our Government while we mean to promote it.

Section 4 is certainly not intended to provide the tools for power to evil men. Its drafters had in mind an altogether different situation. They suppose an ill President, physically unable to give his consent for the assumption of power by the Vice President. Under these circumstances some alternative to his consent must be devised if the Government is to carry on. Thereafter, when the President has recovered sufficiently to resume his duties, or thinks he has, the drafters wanted to be sure of machinery whereby he could recover his powers from a Vice President and Cabinet who might disagree with his own assessment of recovery.

Supporters of this proposal call the power of public opinion to their defense and say a Vice President and Cabinet would not dare seize power from a President physically and mentally able, nor withhold power from him once recovered. But public opinion can be molded, and some Presidents in our history have been most unpopular in office, and probably there will be some in the future.

There is no definition of inability or disability in the proposed amendment, nor is there any provision for the definition of this term. If there has existed an uncertainty of congressional power to define it under existing constitutional provisions, it is clear Congress will be without power to define an inability after House Joint Resolution 1 is incorporated into the Constitution.

The proposal will leave to the President in section 3, and to the Vice President and Cabinet majority in section 4, complete power to treat any condition or circumstance they choose as a disability. It is even conceivable, though I hope not likely, that some President might declare himself unable, and state no reason therefor (since no reason is required by the language) in order to avoid responsibility for some unpopular act, devolving the powers of his office upon the Vice President for the time being to accomplish that purpose. After ratification of House Joint Resolution 1, the Congress definitely cannot define by law what constitutes Presidential disability. I think a good case can be made to vest that power of definition in Congress. Here would be another check and balance in our system, built in to guard against abuse of power.

It was suggested in the hearings that the President might declare his inability because of absence from the country. It seems unlikely that he would do so because he would want to go abroad with full powers of his office, as Presidents have done in the past. But members should know that in the minds of some, the language of this proposal will permit a future President to relieve himself of the burdens of his office, at will, by a declaration of inability due to absence.

The provisions of House Joint Resolution 1 leave many questions unresolved. For example, it does not address itself to the problem of what happens if an Acting President suffers an inability. It overlooks

the possibility of a Presidential inability at a time when there is no Vice President, which might occur soon after a new President succeeded to office and before he nominated a new Vice President. How could the machinery of section 4 work then? Under the language of that section, it would appear essential that there be a Vice President to trigger the machinery of that section.

In my opinion it would be better to work out the answers to these problems and others before submitting this proposed amendment for ratification. There is no real urgency. We now have a Vice President, and an executive understanding between him and the President on the matter of Presidential disability. We should not rush this proposal on its way until it is as perfect as we can make it. These other problems will remain unsolved and those who are concerned about a certainty of succession and ability will continue to press for further amendments.

It will be tragic if we have unwittingly deprived Congress of power to move into any breach in the structure here being fashioned.

Respectfully submitted.

EDWARD HUTCHINSON.

DISSENTING VIEWS OF REPRESENTATIVE CHARLES McC. MATHIAS, JR.

I dissent from the views of the majority of the committee with respect to the grant of power to the President to nominate his heir. I oppose such power as being in conflict with the basic principles of the Republic and the philosophy of the Constitution which tends to disperse, rather than to centralize, power.

The Presidency has always been considered an elective office, but it will not be purely elective if this amendment is adopted.

The Constitutional Convention, as we know it through Madison's Journal, would surely have rejected an appointed Vice President on grounds of principle alone. Modern conditions, while compelling, do not dictate that we abandon principle when we provide a modern method of succession.

The Constitution seeks means to interpose legal safeguards between the weakness, the temptations, and the evil of men and the opportunity to injure the state. We do the same in private life when we ask an honest debtor to execute a mortgage or an honorable man to state his promise or covenant in writing.

By permitting the President to name a Vice President, House Joint Resolution 1 operates on the opposite principle, assuming that a President will always be enlightened and disinterested in naming a Vice President. While this optimism reflects well on the 20th Century's opinion of itself in contrast to the pragmatic 18th century estimate of human frailty, it may not be a prudent basis for constitutional law.

Congressional confirmation of a vice-presidential nominee would be only a mild check and, in my judgment, would be a mere formality in a period of national emotional stress. Most of us who were here in the last dark days of November 1963 would confirm that almost any such request made by President Johnson would have been favorably received by the Congress in our desire to support and stabilize his administration.

Giving the President exclusive power to nominate a Vice President has been justified by a false analogy to the broad discretion allowed modern presidential nominees to express a preference for their running mates. But a presidential nominee and an incumbent President are very different men—even if they inhabit the same mortal frame—and they may be moved by very different motives. A President secure in the White House will have undergone a metamorphosis from his earlier self, insecurely and temporarily occupying the presidential suite at the Blackstone or the Mark Hopkins during the climax of a national convention.

If the presidential nominee really is allowed a personal choice of running mates, he will seek a candidate to complement his own candidacy and to strengthen the ticket. He will want an attractive, vigorous, and patently able associate. The electability of the vice-

presidential candidate is a form of accountability for the head of the ticket. By way of example, recall the probable motives of Senator John F. Kennedy in choosing Lyndon B. Johnson for his running mate and consider whether the same motives would have been decisive with President John F. Kennedy.

Furthermore, the analogy used to justify this amendment would crystallize contemporary political custom into organic law. Current practice at national political conventions and conventions themselves are the creatures of custom only. Customs can and should change as social, political and technological changes affect our way of living. The Constitution cannot and should not be so flexible.

The public today is all too ready to impugn the motives of a President dealing with his Vice President. It is hinted that a President is constantly tempted to relegate the Vice President to a subordinate role in political life. If such motives are credible in daily governmental relations, how much more would they be present in the selection of an heir and successor.

Couple this consideration to the provisions of House Joint Resolution 1 with respect to Presidential inability and the considerations that might move a President to nominate a respectable, but pallid, Vice President. If the heir apparent is to gain certain powers of deposition as well as natural succession, a President may indeed hesitate in seeking a vigorous and aggressive Vice President. Such a danger would not have escaped examination by the framers of the Constitution and should be considered by those who propose to amend it.

CHARLES McC. MATHIAS, Jr.

PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT

JUNE 30, 1965.—Ordered to be printed

Mr. CELLER, from the committee of conference, submitted the
following

CONFERENCE REPORT

[To accompany S.J. Res. 1]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the joint resolution (S.J. Res. 1) proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment insert the following:

That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

“ARTICLE —

“SECTION 1. *In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.*

“SEC. 2. *Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.*

“SEC. 3. *Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary,*

such powers and duties shall be discharged by the Vice President as Acting President.

"SEC. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office."

And the House agree to the same.

EMANUEL CELLER,
BYRON G. ROGERS,
JAMES C. CORMAN,
WILLIAM M. McCULLOCH,
RICHARD H. POFF,

Managers on the Part of the House.

BIRCH E. BAYH, Jr.,
JAMES O. EASTLAND,
SAM J. ERVIN, Jr.,
EVERETT M. DIRKSEN,
ROMAN L. HRUSKA,

Managers on the Part of the Senate.

STATEMENT OF THE MANAGERS ON THE PART OF THE HOUSE

The managers on the part of the House at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S.J. Res. 1) proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice-Presidency and to cases where the President is unable to discharge the powers and duties of his office, submit the following statement in explanation of the effect of the action agreed upon by the conferees and recommended in the accompanying conference report:

The House passed House Joint Resolution 1 and then substituted the provisions it had adopted by striking out all after the enacting clause and inserting all of its provisions in Senate Joint Resolution 1. The Senate insisted upon its version and requested a conference; the House then agreed to the conference. The conference report recommends that the Senate recede from its disagreement to the House amendment and agree to the same with an amendment, the amendment being to insert in lieu of the matter inserted by the House amendment the matter agreed to by the conferees and that the House agree thereto.

In substance, the conference report contains substantially the language of the House amendment with a few exceptions.

Sections 1 and 2 of the proposed constitutional amendment were not in disagreement. However, in sections 3 and 4, the Senate provided that the transmittal of the notification of a President's inability be to the President of the Senate and the Speaker of the House of Representatives. The House version provided that the transmittal be to the President pro tempore of the Senate and the Speaker of the House of Representatives. The conference report provides that the transmittal be to the President pro tempore of the Senate and the Speaker of the House of Representatives.

In section 3, the Senate provided that after receipt of the President's written declaration of his inability that such powers and duties would then be discharged by the Vice President as Acting President. The House version provided the same provision except it added the clause "and until he transmits a written declaration to the contrary". The conference report adopts the House language with one minor change for purposes of clarification by adding the phrase "to them", meaning the President pro tempore of the Senate and the Speaker of the House.

The first paragraph of section 4, outside of adopting the language of the House designating the recipient of the letter of transmittal be the President pro tempore of the Senate and the Speaker of the House of Representatives, minor change in language was made for purposes of clarification.

In the Senate version there was a specific section; namely, section 5, dealing with the procedure that when the President sent to the Congress his written declaration that he was no longer disabled he could resume the powers and duties of his office unless the Vice President

and a majority of the principal officers of the executive departments, or such other body as the Congress might by law provide, transmit within 7 days to the designated officers of the Congress their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon, the Congress would immediately proceed to decide the issue. It further provided that if the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President would continue to discharge the same as Acting President; otherwise, the President would resume the powers and duties of his office.

The House version combined sections 4 and 5 into one section, now section 4. Under the House version, the Vice President had 2 days in which to decide whether or not to send a letter stating that he and a majority of the officers of the executive departments, or such other body as Congress may by law provide, that the President is unable to discharge the powers and duties of his office. The conference report provides that the period of time for the transmittal of the letter must be within 4 days.

The Senate provision did not provide for the convening of the Congress to decide this issue if it was not in session; the House provided that the Congress must convene for this specific purpose of deciding the issue within 48 hours after the receipt of the written declaration that the President is still disabled. The conference report adopts the language of the House.

The Senate provision placed no time limitation on the Congress for determining whether or not the President was still disabled. The House version provided that determination by the Congress must be made within 10 days after the receipt of the written declaration of the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide. The conference report adopts the principle of limiting the period of time within which the Congress must determine the issue, and while the House original version was 10 days and the Senate version an unlimited period of time, the report requires a final determination within 21 days. The 21-day period, if the Congress is in session, runs from the date of receipt of the letter. It further provides that if the Congress is not in session the 21-day period runs from the time that the Congress convenes.

A vote of less than two-thirds by either House would immediately authorize the President to assume the powers and duties of his office.

EMANUEL CELLER,
BYRON G. ROGERS,
JAMES C. CORMAN,
WILLIAM M. McCULLOCH,
RICHARD H. POFF,
Managers on the Part of the House.

PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF VICE PRESIDENT

WEDNESDAY, JANUARY 22, 1964

U.S. SENATE,
SUBCOMMITTEE ON CONSTITUTIONAL AMENDMENTS
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:05 a.m., in room 2228, New Senate Office Building, Senator Birch Bayh presiding.

Present: Senators Bayh (presiding), Keating, and Fong.

Also present: Larry Conrad, counsel, and Clyde Flynn, minority counsel.

Senator BAYH. The subcommittee will please convene.

We are here this morning to consider the problems of Presidential succession and Presidential inability. Notice of these hearings has been duly published in the Congressional Record of January 16, 1964.

It is certainly no stretch of the imagination to say that the subjects that we are met to consider this morning are complex and significant questions. They deserve our urgent attention. There are no quick and easy solutions. But certainly the problems are not insoluble. These are not new problems, to be sure. They have been the subject of discussion from time to time since the adoption of our Constitution. But they have a ringing urgency today with the tragedy of our martyred President so fresh in our memory.

The first of our problems is that we have a void in the Vice Presidency today. It is an almost unbelievable fact of American history that on 16 different occasions totaling more than 38 years in time we have been without a Vice President.

In any one of those years something could have happened to the President. This would have required an officer other than the Vice President to act as President.

Eight times in our history a President has died in office and has been succeeded by the Vice President. Each time this has happened, it has been a severe shock to the Nation. But each time, our Government has withstood the test. We have had orderly transfer of Executive authority. We pray we may never be faced, however, with the supreme test—the loss of a President and Vice President within the same 4-year term of office. But we must prepare for such an eventuality. For whatever tragedy may befall our national leaders, the Nation must continue in stability, functioning to preserve a society in which freedom may prosper.

It seems clear that the best way to assure this is to make certain that the Nation always has a Vice President as well as a President. It is significant that every measure placed before this committee since

President Kennedy's assassination agrees on one vital point—that we shall have a Vice President.

Why have a Vice President? Hasn't this office been the object of sharp satire since the Constitutional Convention created it as an after-thought? Isn't this the job that has been described as a one-way ticket to political oblivion? Maybe so—once upon a time. But no more—not in 20th century America.

Today the Vice Presidency is a sought-after office. It is, in fact, a springboard to the Presidency. The Vice President is the President's chief ambassador. When President Johnson was Vice President, he traveled more than 75,000 miles aboard on missions for the Chief Executive, including top-level trips to Berlin and to Vietnam. Vice President Nixon spent more than twice as much time abroad as did President Eisenhower during the 8 years of their combined administration.

It was when he was on official missions that Mr. Nixon confronted surly youths in Latin America and met Mr. Khrushchev in the now famous kitchen debate.

The Vice President is today an integral part of Cabinet meetings. Modern-day Presidents seek the advice and counsel of their Vice Presidents. The Vice President is a statutory member of the National Security Council. He is Chairman of the President's Committee on Equal Employment Opportunity. He is Chairman of the National Aeronautics and Space Council.

There are few more significant issues today than the security of our Nation, the race for space, and the fight for equal rights. These are among the paramount issues of our age, and the Vice President, by virtue of his office, is in the thick of each of them. Last, but hardly least, the Vice President is the man who is always one heartbeat away from the most powerful office in the world.

There are those who would cloud the issue by criticism, not of the succession law today, but of the distinguished Speaker of the House of Representatives, who, under the present law, as we know, is next in line of succession to the Presidency.

As junior Senator from Indiana and as chairman of this subcommittee I would like to say that those who criticize the Speaker's ability to perform the powers of the Presidency should spend some time watching the actions of the Speaker in the House Chamber or, better yet, in the semiprivacy of the Speaker's room. There can be little doubt as to his capability.

Today the problem goes far deeper than the questions of age or personality of the Speaker. It involves the traditional separation of powers in our form of Government. It involves serious doubt about what would happen if the President were disabled. Would the Speaker, who has toiled for 40 years to reach his exalted position, give it all up to act as President for a few weeks if the President were temporarily disabled? If he did not, would we have a chief legislator also acting as Chief Executive? If the President were to die, couldn't the Speaker be of the opposing political party? What implications would that have for the continuity of Executive policy? Does the Speaker—any Speaker—have the constitutional right to assist the President as a Vice President does? Can the Speaker—any Speaker—possibly run the large and diverse House of Representatives and, simultaneously, prepare properly for the Presidency?

I submit that reason dictates that we take steps to assure that the Nation always have a Vice President. He would lift at least some of the awful burdens of responsibility from the shoulders of the President. His presence would provide for an orderly transfer of Executive authority in the event of the death of a President—a transfer that would win popular consent and inspire national confidence, which is important in any political system.

He would be there to substitute as President, as Hamilton suggested, when events required him to do so.

Our obligation to deal with the question of Presidential inability is crystal clear.

Here we have a constitutional gap—a blind spot, if you will. We must fill this gap if we are to protect our Nation from the possibility of floundering in the sea of public confusion and uncertainty which oftentimes exists at times of national peril and tragedy.

The Constitution spells out in minute detail the procedures for removing a President from office. Yet there isn't a word, not a hint about what is meant by inability of a President. There is no clue as to the method of determining disability, who would make such a determination, what would happen once the determination is made, how the period of inability would be terminated or whether the President would then resume his office or simply lose his job.

History has been trying to tell us something, it seems to me, and it is high time that we listen.

President Garfield lay wounded 80 days before he died. His only official act in that time was the signing of an extradition paper. The Cabinet, without constitutional authority, ran the Government as best it could.

For nearly 2 years after President Wilson collapsed with a stroke, our Government was virtually run by Mrs. Wilson and the President's personal physician—two well-meaning persons devoted to the President, but hardly individuals with constitutional authority to direct our affairs of state.

Again, no one knew what to do when President Eisenhower suffered a heart attack. Later, the President and Vice President Nixon set a precedent with a mutual agreement on what to do in the event of the future inability of the President.

But such informal agreements are unsatisfactory as permanent solutions, and both Mr. Eisenhower and Mr. Nixon were among the first to say so. Such agreements depend on good will between the President and Vice President. They don't have the force of law. They could be subjected to serious constitutional challenge. They open the door for possible usurpation of power from the President. Yet they do not protect the Nation from a President whose disability might involve a mental illness.

These questions can be solved by amending the Constitution. Some say they could best be solved by statute. Frankly, I disagree. Many distinguished lawyers disagree. What most lawyers agree upon is that if there exists a reasonable constitutional doubt, the best method to eradicate any doubt is to amend the Constitution.

We have had three succession laws in our history. We may have many more unless we remove succession from the arena of political expediency and amend the Constitution to provide for a Vice Presi-

dent at all times. It might be remembered that our first succession law, passed in 1792, placed the President pro tempore of the Senate next in line after the Vice President. The recorded reason for this was to avoid placing the Secretary of State too far up in the line of succession. History shows us that Alexander Hamilton was fearful that Thomas Jefferson might possibly ascend to the office of President.

Finally, the time to act is not when a President is lying ill and there is no machinery to deal with the execution of Executive power. If we act in those circumstances, we may come up with an expedient—but ill-conceived—answer to these pressing problems.

It seems to me the time to act is now when we still find it hard to believe that President Kennedy is gone and when we have a President in robust health.

I have made two principal points thus far. I have said that we should provide a means to have a Vice President at all times, and I have said that we must provide machinery for that Vice President to act as President when and if the President is disabled.

I believe strongly that we can provide a Vice President for the Nation by the relatively simple means of having a President nominate an individual for Vice President, when the Vice Presidency is vacant. Then the Congress should act on the President's recommendation by electing or rejecting the nominee.

The President must have a voice in the selection of a Vice President. It would assure the selection of a man—or woman may I add—with whom the President could work harmoniously. It would assure a reasonable continuity of Executive policy, should the Vice President become President. And it is in keeping with tradition, whereby a party's presidential candidate generally has great influence and, at the very least, a veto concerning his vice presidential running mate.

Our traditional system of checks and balances would dictate that the people, through their elected representatives, have a voice in selecting a Vice President.

Under the Constitution, Congress could always call for a special election. In our history, Congress has chosen not to. This has been a wise decision. For a time of traumatic shock—such as a time when we lose a President unexpectedly—is hardly conducive to a well-reasoned selection by popular vote.

On the other hand, the Congress is a body entrusted with making fateful decisions at crucial times. It is the Congress that declares war on behalf of us all. The Congress may elect or remove Presidents in certain circumstances. Certainly, the Congress is the proper body—with its hand on the pulse of public opinion—to elect a Vice President upon the nomination of a President.

In the question of Presidential inability, we must take every precaution to safeguard the President from unwarranted usurpation of his power.

Thus, the President must have the primary right to declare his own disability, and the termination of his disability. But should the President not make known his disability, the Vice President, with the concurrence of a majority of the Cabinet, should have the authority to determine Presidential inability. In such a case, the Vice President would become acting President, just as he would if the President himself declared his own disability.

Again, the President should have the primary right to declare when his disability had terminated. If the Vice President and a majority of the Cabinet disagreed with the President, the continuing inability of the President would be determined by a two-thirds vote of the Members of each House of Congress.

The point of this is to safeguard the President—to give him every advantage in any action or contemplated action. But, at the same time, we want to provide checks and balances because our system of Government recognizes no person—even the President of the United States—as infallible.

A proposed constitutional amendment to accomplish these goals has been introduced by myself and Senators Pell, Randolph, Bible, Moss, and Burdick.

There are other suggestions, some of which have been presented by my learned colleagues here. Frankly, those of us who presented the previously suggested resolution disagreed with the suggestion for two Vice Presidents which has been proposed by my good friend from New York, and we are going to have the opportunity to study this and to discuss it fully.

Basically, we disagreed with the suggestion for two Vice Presidents because we have just reached the stage in our history when the Vice President has become a figure of political significance, and it seems to us to divide the Vice President's duties between two men would perhaps nullify this advancement. We want to be careful we do not nullify this advancement by spreading the duties too thin.

To have one Vice President whose duties would be confined to presiding over the Senate would be to invite men of small political stature and questionable qualifications to stand for one of the highest political offices in the land.

We disagreed with proposals to have the electoral college elect a Vice President upon the President's nomination. The electoral college is not chosen, as is Congress, to exercise any considered judgment or reasoning. Its members are chosen merely to carry out the will of the voters in their respective States. The electoral college is not representative, really, of their respective States. As far as exercising considered judgment is concerned, the electoral college is not equipped, nor should it be equipped, to conduct hearings on the qualifications of the nominee submitted by the President. It would be a cumbersome body to try to assemble quickly and to get to act quickly in emergencies. Much of the general public has no earthly idea who their State's electors are. In fact, this morning, we had a group of constituents in my office and I asked—it was a sizable group—if anyone in the room knew any one member of the electoral college from our State. Not surprisingly, there was not one who knew the members of the electoral college. They have no earthly idea who their State's electors are and would be understandably hesitant to allow any such unknown quantity to make an important decision like confirmation of a Vice President of the United States.

This does not reflect upon the individual qualifications of the electors but rather points up the fact they have just not been accepted by the public as a body to make a considered judgment.

It is apparent that I feel strongly on this subject. I do. It is a vital subject and I have devoted a great deal of time to it. I want this

panel to consider my proposals carefully, and I want it to consider the proposals that will be laid before us by several of our distinguished colleagues. The important thing is to find a reasonable solution acceptable to the Congress and the several States.

I am grateful to the number of writers and interested groups whose concern about this problem will aid this committee in its deliberations. I want to express particular gratitude to the American Bar Association, which assembled a special group of experts in the past 2 days to study this problem. I am hoping that many of the distinguished panelists will appear individually at subsequent hearings on this question.

I am referring to men who met with this committee of the bar association like the Honorable Herbert Brownell, former Attorney General of the United States; the Honorable Ross Malone, former Deputy Attorney General of the United States; Prof. Paul A. Freund of Harvard Law School; Walter E. Craig, president of the American Bar Association; and Lewis F. Powell, Jr., president-elect of the American Bar Association.

One member of this distinguished panel, Prof. James C. Kirby, Jr., of Vanderbilt University, chief counsel of this subcommittee, some time ago, will testify before this committee today. Others on the panel were John D. Feerick, former editor-in-chief of the Fordham Law Review; Jonathan C. Gibson of Chicago; Richard Hansen of the University of Nebraska; Dean Charles B. Nutting of George Washington University; Sylvester Smith, past president of the American Bar Association; Martin Taylor of New York City; and Edward Wright, chairman of the house of delegates of the American Bar Association.

I wish at this point to insert in the record, if there are no objections, the consensus report released yesterday by the American Bar Association's Conference on Presidential Inability and Succession.

If there are no objections, I would ask that this be submitted for the record.

(The report referred to follows:)

CONSENSUS ON PRESIDENTIAL INABILITY AND SUCCESSION, JANUARY 20 AND 21, 1964

The Conference on Presidential Inability and Succession was convened by the American Bar Association at the Mayflower Hotel, Washington, D.C., on January 20 and 21, 1964. The conferees were Walter E. Craig, president, American Bar Association; Herbert Brownell, president, Association of the Bar of the City of New York, and a former Attorney General of the United States; John D. Feerick, attorney, New York; Paul A. Freund, professor of law, Harvard University; Jonathan C. Gibson, chairman, Standing Committee on Jurisprudence and Law Reform, American Bar Association; Richard H. Hansen, attorney, Lincoln, Nebr.; James C. Kirby, Jr., associate professor of law, Vanderbilt University, and a former chief counsel to the Subcommittee on Constitutional Amendments, Senate Judiciary Committee; Ross L. Malone, past president of the American Bar Association, and a former Deputy Attorney General of the United States; Charles B. Nutting, dean of the National Law Center; Lewis F. Powell, Jr., president-elect, American Bar Association; Sylvester C. Smith, Jr., past president, American Bar Association; Martin Taylor, chairman, Committee on Federal Constitution, New York State Bar Association; and Edward L. Wright, chairman, house of delegates, American Bar Association.

The members of the conference reviewed as a group the following statement at the close of their discussions. Although there was general agreement on the statement, the members of the conference were not asked to affix their signatures; and it should not be assumed that every member necessarily subscribes to every recommendation included in the statement.

The conference considered the question of action to be taken in the event of inability of the President to perform the duties of his office. It was the consensus of the conference that :

1. Agreements between the President and Vice President or person next in line of succession provide a partial solution, but not an acceptable permanent solution of the problem.

2. An amendment to the Constitution of the United States should be adopted to resolve the problems which would arise in the event of the inability of the President to discharge the powers and duties of his office.

3. The amendment should provide that in the event of the inability of the President the powers and duties, but not the office, shall devolve upon the Vice President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office.

4. The amendment should provide that the inability of the President may be established by declaration in writing of the President. In the event that the President does not make known his inability, it may be established by action of the Vice President or person next in line of succession with the concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide.

5. The amendment should provide that the ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall not concur in the declaration of the President, the continuing inability of the President may then be determined by the vote of two-thirds of the elected Members of each House of the Congress.

The conference also considered the related question of Presidential succession. It was the consensus that :

1. The Constitution should be amended to provide that in the event of the death, resignation, or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term.

2. It is highly desirable that the office of Vice President be filled at all times. An amendment to the Constitution should be adopted providing that when a vacancy occurs in the office of Vice President, the President shall nominate a person who, upon approval by a majority of the elected Members of Congress meeting in joint session, shall then become Vice President for the unexpired term.

STATEMENT OF HON. HIRAM L. FONG, A U.S. SENATOR FROM THE STATE OF HAWAII

Senator FONG. Mr. Chairman, I wish to make a brief statement in support of Senate Joint Resolution 1 proposing a constitutional amendment on the related problems of Presidential disability and Vice-Presidential vacancies.

Two years ago, the tragic assassination of President Kennedy pointed up once again the urgent need to resolve these two critical gaps in the U.S. Constitution.

First, the Constitution does not say anything about what should be done when there is no Vice President. No one in America today doubts that the Vice-Presidency is an office of paramount importance. The Vice President of the United States today carries very vital functions of our Government. Besides his many duties, he is the only man who is only a heartbeat away from the world's most powerful office. Yet, on 17 different occasions in our history the Nation has been without a Vice President.

The security of our Nation demands that the office of the Vice President should never be left vacant for long, such as it was between November 22, 1963, and January 20, 1965.

Second, the Constitution does not say anything about what should be done when the President becomes disabled, how and who determines his disability, when the disability starts, when it ends, who determines his fitness to resume his office, and who should take over during the period of disability.

In short, there is no orderly constitutional procedure to decide how the awesome and urgent responsibility of the Presidency should be carried on.

Third, the Constitution also is unclear as to whether the Vice President would become President, or whether he becomes only the Acting President, if the President is unable to carry out the duties of his office.

Mr. Chairman, as a member of the subcommittee, I have studied very carefully all the various proposals submitted by other Senators during the 88th Congress and in this current session of the 89th Congress. I have considered the testimony submitted to the subcommittee in previous hearings, including those of the distinguished experts who have testified. I have read the data collected and have read the research done by the subcommittee's staff.

I believe that any measure to resolve these very complex and perplexing problems must satisfy at least four requirements:

1. It must have the highest and most authoritative legal sanction. It must be embodied in an amendment to the Constitution.
2. It must assure prompt action when required to meet a national crisis.
3. It must conform to the constitutional principle of separation of powers.
4. It must provide safeguards against usurpation of power.

I believe Senate Joint Resolution 1 best meets each of these requirements.

Senate Joint Resolution 1 deals with each of the problems of vice-presidential vacancy and presidential inability by constitutional amendment rather than by statute.

This proposal provides for the selection of a new Vice President when the former Vice President succeeds to the Presidency within 30 days of his accession to office; the selection is to be made by the President, upon confirmation by a majority of both Houses of Congress present and voting.

This proposal makes clear that when the President is disabled, the Vice President becomes Acting President for the period of disability. It provides that the President may himself declare his inability and that if he does not, the declaration may be made by the Vice President with written concurrence of a majority of the Cabinet.

The President may declare his own fitness to resume his powers and duties, but if his ability is questioned, the Cabinet by majority vote and the Congress by a two-thirds vote on a concurrent resolution resolve the dispute.

These provisions of Senate Joint Resolution 1 not only achieve the goals I outlined earlier, but they are also in consonance with the most valued principles established by our Founding Fathers in the Constitution.

They observe the principle of the separation of powers in our Government. They effectively maintain the delicate balance of powers among the three branches of our Government. Most important of all, they insure that our Nation's sovereignty is preserved in the hands of the people through their elected representatives in the national legislature.

Mr. Chairman, this is the first time since 1956, when a full-scale congressional study of the problems was conducted, that wide agreement has been reached on these enormously complex constitutional problems.

Last September a measure similar to Senate Joint Resolution 1 was passed by the Senate by the overwhelming vote of 65 to 0. It was sent to the House, but Congress adjourned before any further action could be taken.

Last January, at the call of the American Bar Association, a dozen of the Nation's leading legal authorities meeting in Washington came up with a consensus. This consensus, subsequently endorsed by the ABA house of delegates, is essentially embodied in the provisions of Senate Joint Resolution 1.

Yesterday President Johnson heartily endorsed this proposal.

And earlier this month, the Research and Policy Committee of the Committee for Economic Development released an able study of these questions. Its recommendations closely parallel the provisions of Senate Joint Resolution 1.

I am most delighted and pleased to cosponsor this proposal with the distinguished chairman of this subcommittee as sponsor, and I will commend it highly to the Senate as a meritorious measure that should be enacted promptly into law.

Mr. CELLER. Mr. Speaker, I move that the House resolve itself into the Committee of the Whole House on the State of the Union for the consideration of the joint resolution (H.J. Res. 1) proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office.

The motion was agreed to.

IN THE COMMITTEE OF THE WHOLE

Accordingly, the House resolved itself into the Committee of the Whole House on the State of the Union for the consideration of House Joint Resolution 1, with Mr. FASCELL in the chair.

The Clerk read the title of the joint resolution.

By unanimous consent, the first reading of the joint resolution was dispensed with.

The CHAIRMAN. Under the rule, the gentleman from New York [Mr. CELLER] will be recognized for 2 hours and the gentleman from Ohio [Mr. McCULLOCH] will be recognized for 2 hours.

The Chair recognizes the gentleman from New York [Mr. CELLER].

Mr. CELLER. Mr. Chairman, I yield myself such time as I may consume.

Mr. Chairman, this resolution, House Joint Resolution 1, has bipartisan support. I particularly offer praise to the gentleman from Ohio [Mr. McCULLOCH] and the gentleman from Virginia [Mr. POFF] who participated in the fashioning and polishing of this resolution. They did so most wisely and painstakingly. They immersed themselves into the intricacies of the legislation. Their help was immeasurable. By naming them, Mr. Chairman, I do not wish to detract from the constructive work done by most of the members of our committee, Democrats, and Republicans alike. I want to point out particularly likewise in that regard the gentleman from Colorado [Mr. ROGERS], the gentleman from New Jersey [Mr. ROBINO], the gentleman from Texas [Mr. BROOKS], the gentleman from Massachusetts [Mr. DONOHUE], the gentleman from Wisconsin [Mr. KASTENMEIER], the gentleman from California [Mr. CORMAN], the gentleman from New York [Mr. LINDSAY], and the gentleman from Florida [Mr. CRAMER]. To them I, indeed, offer an accolade of distinction for genuine service.

This is by no means, ladies and gentleman, a perfect bill. No bill can be perfect. Even the sun has its spots. The world of actuality permits us to attain no perfection. Admirable as is our own Constitution, it had to be amended 24 times. But nonetheless, this bill has a minimum of draw-

backs. It is well-rounded, sensible, and efficient approach toward a solution of a perplexing problem—a problem that has baffled us for over 100 years.

As to attaining perfection, let me call your attention to a very pertinent remark made by Walter Lippmann in the New York Herald Tribune of June 9, 1964, when he referred to this proposed amendment. He said:

It is a great deal better than an endless search for the absolutely perfect solution, which will never be found and, indeed, is not necessary.

As was said by the distinguished former Attorney General of the United States, the honorable Herbert Brownell—I commend his words indeed to the gentleman from Ohio [Mr. BROWN]—speaking for himself and speaking for the American Bar Association:

Certainty and prompt action are * * * built into this proposal—namely, House Joint Resolution 1. * * * During the 10-year debate on Presidential disability * * * many plans have been advanced to have the existence of disability decided by different types of commissions or medical experts, by the Supreme Court, or by other complicated ad hoc procedures. But upon analysis, * * * they all have the same fatal flaw, * * * they would be time consuming and divisive.

We tried to avoid freighting down this amendment with too much detail. We leave that to supplementing, implementing legislation. We make the provisions as simple yet as comprehensive as possible.

This is certain: we have trifled with fate long enough on this question of Presidential inability. We in the United States have been lucky, but luck does not last forever. The one sure thing about luck is that it is bound to change.

Sir Thomas Brown once said:

Court not felicity too far and weary not the favorable hand of fortune.

We can no longer delay. Delay is the art of keeping up with yesterday. We must keep abreast of tomorrow. Let us stop playing Presidential inability roulette. Let us pass this measure, which has the approval of the American Bar Association and the American Association of Law Schools. This measure has the approval of 36 State bar associations, including, incidentally, the bar association of the distinguished gentleman on the Rules Committee, the gentleman from Ohio [Mr. BROWN].

Let me read the roster of State bar associations which have approved this measure. The bar associations of Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisi-

ana, Massachusetts, Maryland, Maine, Minnesota, Missouri—one of the gentlemen from that distinguished State had some doubts about it, according to his question, but his bar association approved this measure—New Mexico, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Wisconsin, Wyoming.

If I were perplexed and baffled over a legal question, I would not be likely to go to the gentleman from Ohio. More than likely I would go to a lawyer. The gentleman from Ohio is not a lawyer. This is a constitutional legal question. I would not go to Attorney General Brown; I would go to Attorney General Brownell. What did Mr. Brownell have to say on this subject, as to the need for a constitutional amendment and the fact that it would be dangerous to offer a mere statute? Mr. Brownell said:

The number of respected constitutional authorities have argued that there can be no temporary devolution of Presidential power on the Vice President during periods of Presidential inability.

And whatever we may think of that argument, I think a statute would not protect the Nation adequately with the doubts that have been raised, which have been raised too persistently. As long as there is doubt, lingering doubt, concerning the constitutionality of the statute, as long as there is a question concerning the disabled President's constitutional stature after the recovery, I do not believe any inability, as a practical matter, however severe it may be, would be recognized lest recognition of that disability would oust the disabled President from office. Moreover, if the President's inability were severe and prolonged, you should note that devolution of the Presidential power on the Vice President would be somewhat of a crisis itself.

Beyond that, the present Attorney General, a very erudite scholar and a very practical Attorney General, similarly before the Committee on the Judiciary of the House and the Committee on the Judiciary of the Senate gave eloquent testimony as to the need for a constitutional amendment. I shall not burden you at this moment with his words but shall insert them in the RECORD.

A host of city bar associations all over the country have asked for this bill. The U.S. Chamber of Commerce and chambers of commerce throughout the Nation have likewise asked for this bill in the form of a constitutional amendment and not a statute. When this body is asked to adopt a constitutional amendment, the recommending committee must establish an imperative need for such action. Everyone will agree that amending the basic document, the charter, if you will, of our Nation is not a task to be undertaken lightly. Today, however, we

are faced with filling a gap which has existed since our beginnings, and this gap becomes more threatening as the complexity of the domestic and foreign policy grows.

Article II, section 1, clause 5, of the U.S. Constitution reads:

In case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

Now, even a cursory reading reveals that it raises a host of questions. How do we distinguish between temporary and permanent vacancies? Who determines the inability? In what capacity does the Vice President act in the event of a temporary inability? No distinction is made or even intimated between a voluntary and involuntary inability of the President to discharge the powers and duties of his office. In the event of an inability which a President refuses to acknowledge, who shall declare such inability and, once declared, how does the President recover Executive authority if he be fit to do so? Precedent itself answered the question of the capacity in which a Vice President acts when the President dies. John Tyler took the oath as President of the United States when President William Henry Harrison died, and so it has been ever since because of this precedent that Presidents have been reluctant to declare a temporary inability since it has been feared, and rightly so, that a Vice President might take the oath of office as President even though the inability were of a temporary nature.

On the other hand, Vice Presidents have been reluctant to move forward without precise definition from Congress to undertake the powers and duties of the Office when a President has been temporarily incapacitated lest he, the Vice President, be accused of unwarranted seizure of power. That was the case, you may remember, after the assassination of President Garfield. Vice President Arthur was most reluctant to assume the powers of the Presidency because he feared he might be deemed a rogue, he might be deemed a usurper, and therefore was most hesitant and reluctant to assume that power.

And so it was with the lingering illness, after the stroke that laid low President Wilson, when Vice President Marshall likewise was very reluctant to go forward.

In the meanwhile, what? We had no President, we had no Acting President,

and things went into the doldrums, as it were, from an executive standpoint. Foreign potentates came to this country and could not be received and many bills became law without the signature of the President. Many other inadequacies developed because of that lack which we now seek to fill.

House Joint Resolution 1 answers as many questions as it is humanly possible in drafting a proposal to meet contingencies as yet unforeseen. We cannot meet every conceivable contingency. That is impossible, because sometimes if you try to meet some improbable contingency you open, as it were, a can of worms and you create more difficulties and inequities than you create equities. Therefore it is most difficult even for my colleagues on the committee, wise as they are, to be able to envisage every conceivable eventuality that might be conjured up by the imagination of man. We do not propose to do that. We are simply trying to meet the practical human problems with reference to Presidential inability. Foreseen contingencies have, in my opinion, been succinctly and adequately covered. The language is clear, the procedures sharply in focus.

House Joint Resolution 1 also fills another vacuum. It makes provision for a Vice President in the event there is a vacancy in that office.

Sixteen times the United States has been without a Vice President; or, to put it another way, 37 years of our existence have seen the Office of Vice President vacant. Now the Office of Vice President is assuming more and more importance in this atomic age and in this age of jet planes and spaceships. The Vice President is part of the official family of the President. He is involved with the National Aeronautics and Space Agency; he is involved with the Fair Employment Practices Commission; he is involved in many other activities of the President, including the National Security Council. He attends Cabinet meetings. He represents the President in many functions. He is essential, I would say, in present-day government. He is no longer a "Throttlebottom." He is an important personage. We dare not longer trifle with this situation by neglect. If there is a vacancy, the vacancy must and should be filled.

How the course of history was changed when, for example, as I said before, President Garfield died after lingering for so many days we shall never know.

Again, when President Wilson suffered the severe stroke in 1919, when he was laid low for many months, no effort was made to insure the stability of government. We had petticoat government then. I say that with all due respect to

the ladies, because Mrs. Wilson sought to run the show at that time. I do not know how well she ran it. I do not know whether the show was run at all. It was a dangerous situation. We dare not let that happen again.

So, Mr. Chairman, again a negative factor made affirmative history.

On three occasions during the Eisenhower administration there was temporary incapacity on the part of the President. And, to President Eisenhower's credit, he attempted to minimize the danger of executive lapse by means of a private agreement with Vice President Nixon. Such private agreements, we can all agree, are hardly adequate to meet the situation. There can be as many private agreements as there are differences in the varying temperaments of Presidents and Vice Presidents.

Mr. Chairman, as I said on the opening day of our hearings on Presidential inability on February 9, 1963:

I for one have had a deep and probing interest in solving the problem which arises from the vague language of article II of section 1, clause 5, of the Constitution relating to Presidential inability.

In 1955 the chairman of the Judiciary Committee ordered a staff study into this problem and I appointed a special subcommittee of the ranking members to further the study. This study sought out the views of a select group of leading constitutional law professors and leading political scientists by way of a questionnaire. These answers and analysis were published by this committee in 1957. While that study and the subsequent hearings did not result in a definite legislative proposal, I am convinced that it laid a sound groundwork for the future congressional activities which have taken place in this field.

As a result also of the activity of the press and the public and professional groups, the public has been educated to the seriousness of the situation. There can be no doubt in anybody's mind that this Nation cannot permit the Office of the President to be vacant even for a moment. Opposition of world leadership demands that we avoid the terrible crisis which would result if a vacancy existed in the Office of President for even a short time. The President stands for the sovereignty and unity of the American people. He leads the national administration and he is the Commander in Chief of all the Armed Forces. In this nuclear age his finger rests upon the trigger. He is the sculptor, the administrator of our foreign policy. One would have to be blind not to see and acknowledge the danger and the risk we are faced with at this very moment, lacking a constitutional procedure for the smooth transition of the successor to the office and to the powers and duties of the President.

Fate has been most kind to Americans, but we should not continue to tempt it. I believe that the provisions of House Joint Resolution 1 are classic in their

simplicity, classic in their clarity.

First. In case of the removal of the President from office by death or resignation, the Vice President shall become President. Whenever there is a vacancy in the Office of Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of the Congress.

The President selects his vice-presidential running mate before the convention. He should have the right to do so after the convention, and after the election. In the event there is no Vice President he can fill that vacancy.

There has been some talk about the degrading of Congress, that Congress does not play a part. Congress does play a part because the President cannot select anyone to become Vice President without the consent of both Houses of the Congress. It has been said we should let the Congress, the Members of Congress, select the Vice President. We would have a Donnybrook affair then, indeed. We would have a kind of wheeling and dealing. How would you select a man to be Vice President? The whole Congress? No. He would be chosen by a few select Members of Congress, and a few select Members of the Senate, convening in a caucus, either a Republican caucus or a Democratic caucus. Our method is more democratic. We would have to put the seal of approval upon the man who is selected by the President. The whole Congress does that, not a mere select few, not the elite, I may put it, of either the House or the Senate.

Second. Section 3 deals with a situation where the President voluntarily declares his inability. When the President transmits his written declaration to the President pro tempore of the Senate and the Speaker of the House of Representatives that he is unable to discharge the powers and duties of his office, such powers and duties are to be discharged by the Vice President as Acting Presi-

dent until the President so transmits in a written declaration to the contrary.

I would ask the gentleman from Ohio, where in the Constitution is there a provision, the present wording of the Constitution, any kind of provision, that would permit an Acting President? The term is never used. The statute would be utterly worthless, as worthless as a 2-foot yardstick. We must have a constitutional amendment in that regard. This provision removes the reluctance of both the President and Vice President to move when necessity so dictates. The President is assured of his return to office. The Vice President, as Acting President, will not face the charge that he is usurping the office of President.

We are thus assured of the continuity of Executive authority, which is highly important, the continuity of Executive authority. Once the President says "I am cured, I am able to function again," he goes back to his former position and assumes all of the powers and duties of the President which temporarily devolved upon the Vice President.

Section 4, as distinguished from section 3. This is a situation where the President is unwilling or unable to declare his inability. In that event the Vice President, plus the majority of the principal officers of the executive departments, act. We name them executive departments rather than Cabinet for safety's sake, because the word "Cabinet" is never used in the Constitution. In the event that the Vice President, plus a majority of the principal officers of the executive departments, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President immediately assumes the powers and duties of the office as Acting President.

**STATEMENT OF HON. ROMAN L. HRUSKA, A U.S. SENATOR FROM
THE STATE OF NEBRASKA**

Senator HRUSKA. Mr. Chairman, agreements devised by the President and his Vice President in past administrations to cope with an inability crisis are not satisfactory solutions.

It is abundantly clear that, rather than continue these informal agreements, the only sound approach is the adoption of a constitutional amendment. This amendment would distinguish the inability situation from the three other contingencies of permanent nature, death, resignation, and removal from office, and would recognize that, in the first instance, the Vice President becomes Acting President only.

At this point, we encounter the first major difference of opinion. Some would advocate spelling out the procedure for determining inability within the language of the proposed amendment. I disagree. The logic of locking into the Constitution those procedures deemed appropriate today but which, in the light of greater knowledge and experience may be found wanting tomorrow, escapes me.

The preferred course would be for the amendment to authorize the Congress to establish an appropriate procedure by law. This practice parallels the situation of presidential succession, wherein the power is delineated by the Constitution but the detail is left for later determination.

The purpose of the cosponsors of Senate Joint Resolution 6 is to add one fundamental limitation to the process. Language which simply enables the Congress to prescribe by law the method by which the commencement and termination of any inability shall be determined is open to serious criticism and contains dangerous pitfalls. Without any limitation upon the method, the Congress might adopt a procedure that would violate constitutional doctrines of the most essential character. Throughout our history, these principles have been proven wise and of inestimable importance.

I refer primarily to the doctrine of separation of powers. The maintenance of the three distinct branches of Government, coequal in character, has long been accepted as one of the most important safeguards for the preservation of the Republic. However, one does not have to look long to find instances in which this doctrine is threatened. Some of the pending proposals on presidential inability illustrate how seriously the doctrine can be impaired if care is not exercised.

This is the rationale behind the limitation contained in Senate Joint Resolution 6 which provides that the executive branch shall determine the presence of and termination of the inability of the President. It is essential that the method ultimately selected shall have the executive branch determine the commencement and termination of any inability. Stated another way, Congress must be prohibited from prescribing a method which would involve either the judicial or the legislative branch of the Government. This is a significant limitation, as those who propose it will acknowledge. But it is an indispensable prohibition if our efforts to resolve the problem of presidential inability are to be successful.

The determination of presidential inability and its termination is obviously a factual matter. No policy is involved. The issue is simply whether a specific individual with certain physical, mental, or emotional impairments possesses the ability to continue as the Chief Executive or whether his infirmity is so serious and severe as to render him incapable of executing the duties of his office.

To inject Congress into the factual question of inability would be to create a secondary impeachment procedure in which the conduct of the President would not be the test. Such a determination would be fraught with uncertainties. It would require no specific charge. It would not define the proof which is required. It would be a determination of facts with no guidelines against which to measure them.

The impeachment trial of President Andrew Johnson affords a clear illustration of the dangers presented when Congress is allowed to perform a judicial function. The intrigue and interplay within the Congress during the impeachment trial serves as a warning of clear and present dangers which exist when Congress is called upon to consider where to place the mantle of the presidential powers.

An additional compelling argument for restricting this authority to the executive branch is that this determination must be made with a minimum of delay. In an age of advanced weapons and an accelerated pace in national and international affairs, the luxury of weeks or even days to assemble a quorum prior to reaching a decision cannot be afforded. The executive branch is clearly best equipped to respond promptly as well as effectively in the face of such a crisis.

Obviously, such a decision must rest on the relevant and reliable facts regarding the President's physical or mental faculties. It must be divorced from any thoughts of political advantage, personal prejudice, or other extraneous factors. Those possessing such firsthand information about the Chief Executive, or most accessible to it on a personal basis, are found within the executive branch and not elsewhere.

We must be mindful that the President is chosen by the people of the entire Nation. It is their wish and their right that he serve as President for the term for which he was chosen. Every sensible and sympathetic construction favoring his continued performance of Presidential duties should be accorded him. Indeed, were error to be committed, it should be in favor of such a continuation in office or, were it interrupted by a disability, by his resumption of the office at the earliest possible moment upon recovery. The members of the executive branch are best situated to protect that interest.

From what briefly has been developed, it is readily apparent that neither the judiciary nor the legislative branch should be injected into the decisionmaking process of declaring Presidential inability or recovery. As if in confirmation of the point, we have the expression of Chief Justice Warren that it would be inadvisable for the Court or any of its members to assume such a role. Our personal awareness of the acutely political role pursued by Members of Congress likewise forbids injection of this branch into that process.

It is for these reasons, Mr. Chairman, that Senate Joint Resolution 6 is offered for your subcommittee's consideration. I look forward to

the opportunity of working with the subcommittee in its notable effort to devise a sound and acceptable solution to one of the most delicate constitutional issues facing our country today. Events of the last few weeks argue against further delay.

Mr. Chairman, I appreciate the chairman's desire to confine these hearings to as reasonably a short period of time as is possible. It cannot be denied, however, that we are considering a very, very important subject. I do think that we should not throw everything to the winds just for the purpose of expediting action on this matter.

Senator BAYH. And the Senator does not care to do it.

Senator HRUSKA. I know that is not your intention. I should like to make a brief summary of the position which I had assumed and declared last year and ask permission to file a more extended statement.

Senator BAYH. May I clarify what I said a moment ago? The reason the Senator from Nebraska was not asked to make a statement earlier was because we discussed this matter, as you recall, and you suggested that in deference to the Attorney General, we forgo our statements. As I remember, what I said was not very concise and specific at all in presenting the proponents' arguments, because I thought the Attorney General should have the opportunity to make his statement. There is no desire on the part of the chairman to limit the length of this hearing. Certainly, the reason that we are trying to concentrate the time which is spent in the hearings by hearing others who might be in opposition to Senate Resolution 1 is for this very purpose. We have had a complete array of testimony supporting it and we want to make absolutely certain that everyone who objects, who has a clarifying thought or alternative solution, has a complete opportunity to be heard. This could very well be helpful to us.

Senator HRUSKA. Thank you, Mr. Chairman.

It is customary, the chairman realizes and recalls, that we always defer to members of the Cabinet first before we get into the testimony by members of the committee and then later by Members of the Senate at large.

Mr. Chairman, I should like to say that the hearings of this committee last year and this year and the wide public discussion of this subject, climaxed by the President's message which the Congress received yesterday—all of these things augur well for prompt and favorable action on a much-needed constitutional amendment. The Senator from Nebraska would like to say that by and large, he is in agreement with Senate Joint Resolution 1. Certainly I am in full agreement with sections 1 and 2.

Section 3, provides that "if the President declares in writing that he is unable to discharge the powers and duties of his office such powers and duties shall be discharged by the Vice President as acting President." In that regard, I shall just make the suggestion that the committee consider some language—it can be very concisely stated, I am sure—which would enable the President to provide for a brief and limited transfer of Presidential powers to the Vice President as acting President during periods of the President's absence from the country, or otherwise out of reliable communication. I shall not press the point any further than to make that suggestion.

It is fortified somewhat by the statement made by former Attorney

General Herbert Brownell a year or two ago before this subcommittee.

Sections 4 and 5, however, are subject to two observations. The first is that section 5 violates the doctrine of separation of powers, as I understand it. Second, it details procedures in a way which is better left for legislation by Congress.

In regard to the separation of powers, section 5 provides that in disagreement between the President on the one hand and the judgment of the Vice President and a majority of the Cabinet on the other, Congress will then decide the issue by a two-thirds vote and will do it immediately. I shall not at this time go into the question of what "immediately" means and what difficulties would be encountered in regard to construing "immediately." That has been pretty well covered. But I do suggest that it is customary for the Congress to proceed by way of hearings. They would want evidence. They would be entitled to it. They would be entitled to have members of the Cabinet come before it to express their opinions and their report on observations of the President's condition, health, and so on. Certainly there would be debate in the Senate and in the House as well. When we say "debate," then of course, we might get into some difficulty as to the length of that debate.

It is my suggestion, that the Cabinet should decide the factual issue as to whether or not their appraisal of the situation is correct or whether the President, in saying "I am once again able to resume the duties of the Presidency," is right.

There are several points to be made on this question. One is, as I have already said, that it is a factual issue rather than a policy issue. The policy issue has already been decided in the preceding election. They want Mr. X as President of this country. Every fair intendment should be given to see that the continuance of that man in office should not be subverted.

Who is the best informed to resolve and decide this factual question? It would be those who are close to the President. Those who see him, talk to him, and observe him. Those who have had a chance to talk to his physicians and to members of his family.

This factual issue should be resolved by those who are loyal to the President and sympathetic to him. It should be at the hands of people who would give him every fair intendment for his continuation of service as President. If doubt exists, they should resolve it in favor of the President. But if there is a flagrant case of disability, then certainly they should act and I feel confident would act firmly.

There is one other tremendous advantage that Senate Joint Resolution 6 would have over the provisions of section 5 of Senate Joint Resolution No. 1. That is that the Cabinet could act expeditiously without being so hurried in their decision that they would sacrifice substance and merit for a decision.

If they do not act and do not support the Vice President, then, of course, the issue is automatically resolved. The President resumes the discharge of the duties of his office.

Mr. Chairman, there has been a great deal of public discussion of this amendment. I want to congratulate the chairman for the fashion in which he has held these hearings this year and last year.

The hearings and the fine fashion in which he arranged them contributed greatly to the public discussion of this problem, which is so wholesome and so healthy. I should like to place in the record at this point some of the printed reactions to these proceedings.

One is a New York Times editorial of January 5, 1965, which comments on the report of the Committee for Economic Development under the chairmanship of Marion B. Folsom. That report is a splendid report. It is very thoughtful and very thorough. I quote only briefly:

The group proposed some revisions in the Bayh amendment, most importantly a shift in the main burden of responsibility for declaring a President's disability from the Vice President to the members of the Cabinet. This would be an improvement.

That was from the New York Times article.

There was another one in the Washington Post, an editorial entitled "An Achilles Heel?" There they dwell in particular upon this matter of time:

What does the word "immediately" mean? Would it require both Houses of Congress to vote without debating the issue? Would it permit any filibustering in the Senate?

Then they go on into the matter of saying would it be wise to prescribe a 10-day period or maybe a 15- or 30-day period, whatever it may be? In that respect this editorial is a very enlightening one.

There was another one in the Washington Post on January 8, Mr. Chairman, which I would like included. An article appeared in the Quarterly of the American Interprofessional Institute, entitled "The Year We Had No President" written by Richard H. Hansen, who is the author of a book by that same title and a great student of this problem.

I should like to ask unanimous consent that these documents be incorporated into the record at the conclusion of my remarks and that I then be given permission to file the statement which will be more definitive and more particular as I have described before.

**STATEMENT OF HON. RICHARD M. NIXON, FORMER VICE
PRESIDENT OF THE UNITED STATES**

Mr. NIXON. Thank you very much, Mr. Chairman.

I appreciate the opportunity to appear before this committee and having been a member of Senate investigating committees as well as committees conducting hearings as this committee in terms of legislation, I know that at about this time in your proceedings witnesses begin to repeat as far as the various statements that they make. I have taken the liberty of reading summaries of the testimony that has been given to this committee to date, and consequently, I will try not to bore you by repeating those particular ideas that have already been expressed by others.

I think perhaps the best service I could render to the committee in the hearings is to present to you those areas where I might disagree with proposals that might be considered by the committee and any new proposals that I might have that have not already been presented to you.

I would like to begin by stating that in my opinion the hearings being conducted by this committee are the most important hearings from the standpoint of the country that are being conducted in Washington today.

Others are more sensational, others may have greater, shall we say, political effect, but these hearings involve the future of the United States as no other hearings perhaps in recent years have.

It involves the Office of the Presidency and the powers of the Presidency, and as I will point out in my remarks with regard to disability, it involves the defense of the United States of America.

As I appear before you, I want to make it clear that I don't have any pet idea here to sell. I naturally have strong convictions that the proposals I have made with regard to succession and disability are perhaps the best approach.

But what is important is not that this committee adopt my proposals, what is important is that this committee make a recommendation to the Congress, to the Senate, and to the Nation which will get action on these two problems, the problem of succession and the problem of disability.

I say that because when we look at the American Constitution, a very remarkable document, it has very few weaknesses or flaws in it. The major weakness was that with regard to disability, which, as the chairman has pointed out in his opening statement, has caused concern in this country several times since the Constitution was adopted.

With regard to succession, we all know that there has been a shifting idea as to how that problem should be handled. But now it seems to me that, as I am sure it does to the members of this committee who have been participating in these hearings, the time has come to remedy the constitutional flaw with regard to the Office of the Presidency itself in respect both to succession and to disability.

I say the time has come because the American people, as a result of the assassination of President Kennedy, and as a result prior to that time of President Eisenhower's illnesses, I think are aware of the problem. They believe that something should be done about

it but the more time that is allowed to elapse between those events the less urgency for it will be felt by the American people and, of course, by the Congress to get action to deal with these problems.

So, the time is now, and I would urge the committee to proceed as effectively as possible in getting a united proposal, backing it and getting action on it.

I would say further in the general sense, that while these hearings deal with succession and while succession, as I note from the reports in the papers and the reports of the committee's hearing, seems to attract the most attention and the most interest, in my opinion, the major problem, and the problem that needs most urgent attention is not succession but disability.

We do have a succession law at the present time. There is, on the other hand, as far as disability is concerned only an informal agreement which has no standing as far as law is concerned between President Johnson and Speaker McCormack who is the next in line in succession, the same agreement that President Eisenhower had with me and that President Kennedy had with Vice President Johnson.

So, I would agree in this instance with the position that Senator Keating, I understand, has taken very strongly before this committee of which he is a member, that disability is the more urgent of the two problems.

However, I would say that this is the time to deal with both problems, succession and disability, and to strike, in effect, while the iron is hot.

Now, turning to specific proposals, I would like to discuss first the problem of succession.

I have set forth my views on succession in an article which I wrote for a magazine and, with the chairman's permission, I would like to submit that article for the record and thereby save the time of the committee by reading it into the record.

Senator BAYH. Without objection we will include it at this point in the record and the Chair would like to compliment the author for his very incisive argument which I read with a great deal of interest. (The magazine article referred to follows:)

[From Saturday Evening Post, Jan. 1, 1964]

WE NEED A VICE PRESIDENT NOW

(By Richard M. Nixon)

We must fill the office of Vice President immediately, says a man who held the job 8 years. Here is his compelling proposal.

The 8 weeks that have passed since the assassination of President Kennedy have been a period of great soul searching for the American people. We have asked ourselves how this tragic act of violence could have happened in our country. We have urged that steps be taken to provide better protection for our Presidents in the future.

We have also a new, hard look at the question of Presidential succession. And we have concluded that there is a serious deficiency in an otherwise remarkable constitutional process.

While everyone knows that eight Vice Presidents have succeeded to the Presidency upon the death of an incumbent, it is not so well known that another seven Vice Presidents of the United States have died in office, and one has even resigned. The Office of the Vice President has been vacant 16 times. In other words, during over 40 years of our history, this Nation has not had a Vice Presi-

dent and there has been no constitutionally elected successor to the President.

Three times the Congress has dealt with this problem.

The first law, passed in 1792, made the President pro tempore of the Senate and then the Speaker of the House of Representatives the next in the line of Presidential succession after the Vice President. These congressional officers were put ahead of the President's Cabinet because Hamilton, the Federalist Party leader, wished to block the path of Secretary of State Jefferson.

This law was changed in 1886, during the Democratic administration of Grover Cleveland. His Vice President had died the year before, and the Senate was controlled by the Republicans. To prevent the possible elevation of a member of the opposition party to the White House, the line of succession was given to the Cabinet, starting with the Secretary of State.

The last change was proposed by President Truman in 1945. He requested Congress to make the Speaker of the House his successor. Some observers at the time suggested that he was motivated by the belief that Speaker Rayburn would make a better President than Secretary of State Stettinius. And so, since 1947, when this law was enacted, the line of succession to the Presidency has run: Vice President, Speaker of the House of Representatives, President pro tempore of the Senate, the Secretary of State, and finally the other members of the Cabinet.

Assuming that a law should be written for all time and not just to deal with a temporary situation, the conclusion is inescapable that the laws of Presidential succession have in the past been enacted for the wrong reasons.

Now is the time to make a change for the right reason.

The right reason is not that a Speaker of the House is always less qualified to be President than a Secretary of State. Sam Rayburn, for example, would have been a better President than Edward Stettinius. And the present Speaker, John W. McCormack, is a man with a distinguished record of 40 years' service to our Nation, who has always stood in the forefront of the fight against communism both at home and abroad.

Yet, as recent Presidents have rightly given more and more responsibilities to their Vice Presidents, the present system now raises to what has truly become the second office in the land a man who already holds one of the most burdensome offices of government—the Speaker of the House. Moreover, it is not unlikely that a Speaker could be of a different party from the President's. This was the case during the 80th Congress when President Truman would have been succeeded by Republican Speaker Joseph Martin.

So, putting present personalities aside, we must write a new law of Presidential succession. And as did the framers of our Constitution, we must write for posterity, not merely for the moment.

There have been three serious proposals recently made for changing the law of Presidential succession.

First. It has been proposed that we go back to the old system of putting the Secretary of State and the Cabinet ahead of the Speaker of the House in the line of succession. But a good Secretary of State doesn't necessarily make a good President. While a particular Secretary of State might be an excellent choice, just as a particular Speaker might be, this proposal offers us no such guarantee. It is significant to note that no one who has held the office of Secretary of State has been elected to the Presidency since James Buchanan. And, as President Truman suggested in 1945, I believe, there are advantages in elevating a man to the Presidency through the elective, rather than the appointive, office.

Second. It has been proposed that the Congress elect a new Vice President. A similar plan would have the President appoint a Vice President with the consent of the Congress. Both of these proposals, however, could create grave difficulties if the Congress happened to be controlled by the opposition party, which has been the case during the terms of 16 Presidents.

Third. Senator Kenneth Keating, of New York, has introduced a constitutional amendment to provide for the election of two Vice Presidents. First in the line of succession would be an Executive Vice President who would have no other constitutional duties. The second Vice President, or Legislative Vice President, would then follow in the line of succession, and would have the constitutional duties of presiding over the Senate and breaking tie votes. The major disadvantage of this novel proposal is that by dividing the already limited functions of the office, we would be downgrading the Vice-Presidency at a time when it is imperative that we add to its prestige and importance.

How can we best design a new law which will not have these objections? I believe the trouble in the past was that changes in the law of succession have been made to deal with an immediate, personal situation. Because it was thought that a particular individual should not be President, the plan was changed to block that man. Instead of trying to devise a plan which will promote or block a particular man, what we need to do is to direct our thoughts generally to the question of the kind of man who would be best fitted to succeed to the Presidency of the United States and then design a plan which will find that man.

What qualifications should a Vice President have?

He should be a man qualified to be President.

He should be a full-time Vice President with no other official duties.

He should be a member of the same political party as the President.

He should have a political philosophy which is close to that of the President, particularly in the field of foreign affairs.

He should be personally acceptable to the President, but since he may potentially hold the highest office in the land, his selection should reflect the elective, rather than the appointive, process.

What kind of plan will allow the selection of such a man?

I believe there is one proposal that has not been given adequate consideration to date and that would best accomplish this purpose. It would take the form of an amendment to article II, section 1, of the Constitution and would read as follows:

"Within thirty days after a vacancy occurs in the office of Vice President, either because of death, removal, or the elevation of the incumbent to the Presidency, the President shall reconvene the electoral college for the purpose of electing a Vice President of the United States."

This proposal, as is the case with Senator Keating's, recognizes that merely changing the law of succession does not necessarily fill the office of the Vice President. And the office of Vice President itself, apart from the question of succession, has become necessary to the country.

By using the electoral college as the instrument for selecting a new Vice President, we would be relying on a popularly elected constitutional body which in contrast to the Congress always reflects the will of the people as of the last presidential election. While it is true that the electoral college is now a constitutional anachronism, this important new function would upgrade the body and would bring about the selection of more responsible persons to serve on it.

Besides filling the Vice Presidency and reflecting the will of the electorate, this plan assures continuity of programs and the selection of a Vice President who can work with the President. For, as in the case of the nominating conventions, where the presidential candidate has the greatest voice in selecting his running mate, so too could we expect the President to have the greatest influence in the deliberations of the electoral college. He would probably recommend the man most acceptable to him as the new Vice President.

But the fact that the electoral college would have the final authority to make the decision would be a safeguard against arbitrary action on his part. Most important, it would mean that whoever held the office of President or Vice President would always be a man selected by the people directly or by their elected representatives, rather than a man who gained the office by appointment.

We now come to the most critical question of all—how do we get action on this or one of the other proposals which have been made to deal with the problem of presidential succession?

The failure of the Congress to act on the equally important question of Presidential disability is a case in point. The Constitution does not set forth a procedure as to how and when the Vice President shall assume the duties of President when the President is unable to serve because of illness. Fifty years ago the country could afford to "muddle along" until the disabled President either got well or died. But today when only the President can make the decision to use atomic weapons in the defense of the Nation, there could be a critical period when "no finger is on the trigger" because of the illness of the Chief Executive.

After his heart attack in 1955, President Eisenhower asked the Congress to correct this situation. When the Congress failed to act, he took matters in his own hands and in 1958 wrote me a letter the key paragraphs of which follow:

"The President and the Vice President have agreed that the following procedures are in accord with the purposes and provisions of Article 2, Section 1, of the Constitution, dealing with Presidential inability. They believe that these

procedures, which are intended to apply to themselves only, are in no sense outside or contrary to the Constitution but are consistent with its present provisions and implement its clear intent.

"1. In the event of inability the President would—if possible—so inform the Vice President, and the Vice President would serve as Acting President, exercising the powers and duties of the office until the inability had ended.

"2. In the event of an inability which would prevent the President from so communicating with the Vice President, the Vice President, after such consultation as seems to him appropriate under the circumstances, would decide upon the devolution of the powers and duties of the office and would serve as Acting President until the inability had ended.

"3. The President, in either event, would determine when the inability had ended and at that time would resume the full exercise of the powers and duties of the office."

This historic document was later adopted by President Kennedy, and most recently by President Johnson. But it must be remembered that this procedure is merely a stopgap. It does not have the force of law. I strongly believe that either legislation or a constitutional amendment should be enacted to solve this problem on a permanent basis.

The time has come to give top priority to the consideration of proposals to deal with both Presidential succession and Presidential disability. The most effective way to get action is to set up a bipartisan Presidential Commission, such as the famed Hoover Commission on the Reorganization of the Executive Branch of Government. President Johnson might appoint to the commission to serve as public members our three former Presidents, Hoover, Truman and Eisenhower. The Speaker and the President pro tempore of the Senate would appoint the six other Members from the House and Senate. The recommendations of such a distinguished, blue-ribbon panel would not only be of great merit; they would, with the backing of the President, be almost sure to become the law of the land.

It is a tragic fact that it took a terrible crime in Dallas to remind us of a serious defect in our constitutional process. The murder of our President has forced us to reassess our law of succession and the office of the Vice President.

Both Presidents Eisenhower and Kennedy recognized the importance of the Vice Presidency as no other Presidents had done before them. The extensive duties assigned to Vice President Johnson and myself, at home and abroad, were unprecedented in our history. The country now feels safer and more confident because of the experience that Mr. Johnson gained while serving under President Kennedy. Clearly there can be no reversal of this trend toward greater duties and responsibilities for the Vice President.

When a President dies in office, the man in his party who has been best trained for the Presidency should succeed him. The Vice Presidency today, as a result of the way both President Eisenhower and President Kennedy upgraded the position, is the only office which provides complete on-the-job training for the duties of the Presidency.

We have swiftly and dramatically been reminded again that when we choose a man for Vice President we may also be choosing a man who will become President. This means that our Presidential nominating conventions can no longer fall back on the politically cynical formulas of "balancing the ticket"—of choosing a Western for Vice President only because the Presidential candidate is an Easterner, or a conservative because the standard-bearer is a liberal.

From now on it is absolutely essential that both political-party conventions nominate two Presidents—candidates for both national offices, President and Vice President—who have the ability and experience to lead the United States of America in these perilous times.

Mr. Nixon. With regard to the article I have written and the proposals I have made, I again emphasize that I do not insist that this is the only way to handle the problem.

In my opinion as far as succession is concerned there are several general principles that this committee, the Congress, and the Nation should have in mind.

First, the new law or the constitutional amendment, whichever the

committee decides is appropriate, should be written not for the problem of the moment, but for posterity. The great difficulty in the past has been that every time the problem of succession has come up, the law has been changed because a particular administration or a particular President didn't like the situation as far as his own successor might be concerned.

Therefore, this committee, I am sure, is looking at that from the long-range standpoint.

Now, the second point I would make is the considerations that the committee should attempt to deal with in writing either a law or a constitutional amendment, are these:

First, we should be looking for the qualifications that the Nation needs in a President of the United States. Now, those qualifications sometimes may exist in a man who currently may be Speaker of the House. They may sometimes exist in a man who may be currently the Secretary of State. But other times there might be some other individual whom the President of the United States, the people of the country generally, would feel was better qualified at a particular time to be the second in the line of succession.

The second point I would make is that the man that I think who generally is best qualified to succeed to the Presidency in the event that something happens to the President is the Vice President of the United States.

I say this particularly in view of the record with regard to the transition from President Kennedy to Vice President Johnson. It was a smooth transition. This was a credit, of course, to President Johnson, and his handling of that situation. But it is also a credit to the system. The Vice President, particularly in recent years, is cut in, in effect, on all of the major decisions and, therefore, he is prepared to take over as President as no one else, not the Speaker, not the Secretary of State, no one else in the country, is prepared to take over.

Therefore, I believe that this committee should adopt a proposal which will fill the office of Vice President.

A second reason I believe this is important is that this country now, I think, needs a Vice President. This could not have been said perhaps even 25 years ago. But it can be said today, and clearly apart from the fact that the Vice President is the man that I think is best qualified to be President in the event the President became incapacitated. I think that the Vice President serves a very useful function in Government.

I think President Johnson, for example, today, could well use the services of a Vice President to handle some of the many problems that he handled as Vice President before he succeeded to the Presidency.

Now, we come, of course, to the critical point: how do we find a new Vice President, having in mind the fact that that office has been vacant not only eight times as a result of the Vice President succeeding to the Presidency, but eight other times when the Vice President either died in office and one, of course, resigned the office.

Now, on this score my proposal is that the electoral college be reconvened and that the electoral college, with the recommendation of the President, select a new Vice President.

From reading these hearings, I find that there are many who find

objections to that proposal, and like any proposal it has its weaknesses.

I think its merits are, first, that the electoral college as distinguished from the Congress will always be made up of a membership a majority of which is of the President's own party.

The Congress 20 percent of the time during the history of our country has been under the control of a party other than that of the President of the United States. It seems to me then that the electoral college has that advantage over the Congress as the elective body which will select or approve the selection of the new Vice President.

A second point that I should make, however, in this respect, is that I feel that it is most important that the new Vice President come from the elective rather than the appointive process.

I do not mean by that that I would oppose or that this committee should oppose a proposal whereby the President of the United States recommends to either the electoral college or the Congress a name for approval as Vice President, but in the final analysis whoever is to hold the Executive power in this Nation should be one who represents and has come from and has been approved by the electoral process rather than the appointive process.

Now, going to the problem with regard to the selection of a Vice President and his approval by the Congress, I would say that in this instance, that it should be made clear either in the hearings or perhaps even in the law, that the President of the United States has a right to have as his Vice President a member of his own party; that he has a right also to have as Vice President a man who is compatible with his views.

Now, naturally, those objectives will be reached if the committee adopts a proposal of having the President recommend the man that he wants for Vice President, either to an electoral college or the Congress.

I feel very strongly that should be, therefore, the proper procedure.

Rather than having the Congress, if it is to be given the authority, consider several names, I think it is much better to have the President of the United States make the recommendation of one name and the Congress either accept it or reject it.

This is the way, of course, in practice that our Vice Presidents are selected now, and I believe that that way, while it has some weaknesses, is the best way in view of the factors that I have mentioned.

Now, turning from the question of succession and turning to the question of disability, I mentioned a moment ago that I considered the question of disability more important, more urgent at the present time than the question of succession.

Looking at the problem of succession, I would like to say I think it has been most unfortunate that so much of the discussion with regard to succession has been with regard to personalities; the article downgrading Speaker McCormack, for example, I heartily disapprove of.

The articles suggesting, well, a Secretary of State is always better qualified to be President than a Speaker or vice versa, I think those articles make no sense at all, and those arguments I do not think are appropriate ones.

I think the moment that you get into the personalities you are writing for the moment rather than writing law for the ages.

Looking at disability, which is a problem that has not been dealt with, let me point up the difficulties with the present situation. There is a letter, a letter whose contents this committee, of course, is familiar with, written by the President of the United States to the next in line of succession, indicating what would happen and what procedures would go into effect in the event of disability.

But that letter has no force in law whatever, and if an argument developed, and if you will read some of the books that presently have come out with regard to those tragic last moments of Woodrow Wilson in the White House, such arguments can develop, if an argument should develop between the President's personal family and the President's official family, a letter that the President may have written to the next in line of succession wouldn't mean anything at all, in my opinion.

Therefore, it is imperative that this problem be dealt with and dealt with now. That brings me then to the one point at issue with regard to how this problem should be dealt with. Let me say that I approve generally of the proposals that have been made by former Attorney General Brownell, former Attorney General Rogers, as well as President Eisenhower, with regard to disability.

Those proposals represent, as this committee is aware, the considered conclusions of those of us who went through the Eisenhower disability periods, and I believe that those proposals are sound.

I will not elaborate on them at this time.

This is one area, however, of disagreement in which I will take a position which differs to an extent from that taken, I understand, by President Eisenhower in his letter to this committee.

The critical point arises when a Vice President has taken over the powers and duties, not the office of the Presidency, because the President has been disabled, and then at the point where the President believes he has recovered sufficiently to take the duties back, and an argument occurs as to whether he is able to do so or whether he is not able to do so.

In that particular case it is my belief that where the Vice President, together with the approval of the majority of the members of the Cabinet, determine that the President is not able to take over the powers and the duties of the office, to regain them again, and where the President declares that he is able to do so, that then that conflict should be decided by the Congress of the United States, and not by a commission.

I take a very dim view of referring major constitutional problems of this type to commissions. Commissions are not responsive, and they do not have to, of course, account to the electorate, and I believe that the Congress, with its committee system, could much better handle this situation than a commission.

Let's suppose, for example, that a commission of seven were to consider this problem, and the vote were 4 to 3 or 5 to 2 that a President was or was not able to assume the duties of the office.

Certainly whoever held the office after that kind of a commission hearing, men who were not elected by the people, certainly whoever held that office would hold it under a cloud, whereas, if that decision were made by the Congress, after a hearing set up under the proper

circumstances, then at least even if the vote were close in the Congress, it would represent a vote of the people's representatives.

I think, in other words, that the commission approach should not be adopted by the committee. I think it would simply confuse the situation.

With regard to the whole problem of disability, it seems to me that we have to have in mind one fundamental new fact. The chairman recounted the history of disability, and that history itself is a warning of what can happen when we have a man in the office of the Presidency who is unable to carry on the powers and the duties.

But looking back to the period of Woodrow Wilson, I would like to say that I happen to be, despite my difference in partisan affiliation, always been one who was a great admirer of Woodrow Wilson. I think he was one of the great Presidents of this country, and yet in that critical period after he went to the Peace Conference and returned to the United States, I think it could probably be said today that the peace was lost after his leadership had helped to win the war.

For 17 months we had no President of the United States in the real sense.

Now, let's look at the situation today. Today only one man in this world, in the free world, can defend the security of the free world in the event of attack. Only one man's finger is on the trigger.

The United States and the free world can't afford 17 months or 17 weeks or 17 minutes in which there is any doubt about whether there is a finger on the trigger, and that brings me to my last point.

I know there is argument, as there always is, between constitutional lawyers as to whether this should be handled by a constitutional amendment or by legislation.

I, personally, favor a constitutional amendment dealing with both succession and disability.

On the other hand, I would suggest that because a constitutional amendment may take 2, 3, 4 years for enactment, that this committee might well adopt legislation dealing with disability, interim legislation, the same proposal, as a matter of fact, that you might eventually include in the constitutional amendment because the legislation can then be passed and the legislation would be effective in the interim period in the event there was a disability problem.

That, Mr. Chairman, concludes all of the remarks that I think have not previously been covered by other witnesses before the committee, and I would simply say at the conclusion, reemphasize what I said at the beginning: Having been in many sensational hearings in this room as a Senate investigator and in the House caucus room as a House investigator, I can imagine that members of this committee sometimes wonder whether these hearings will ever produce anything, whether there is enough public interest, whether they are worthwhile.

I emphasize what I said before, the country may not be interested enough in what is going on in these hearings, but there is no decision that is more vital to the future of this country than the decision this committee, and this Congress, will make to deal now with the problem, first, of disability, and, second, of succession.

Senator BAYH. Thank you very much, Mr. Vice President.

I would like to note at this time the presence of the senior Senator from Hawaii, Senator Fong, and if there is no objection, we will proceed to ask you a few questions, if you do not object.

Mr. NIXON. Certainly.

Senator BAYH. To close the session, I am going to ask Senator Fong, who is a coauthor of one of the proposals, to make a statement.

Mr. Vice President, one of the witnesses before the committee earlier said it was his opinion that although the informal agreement on inability that is presently in effect, which you and President Eisenhower initiated, would, in fact, with the passage of time, become common law precedent and would have the force and effect of law and would be much simpler than involving the other bodies which both you and I seem to think should be brought into this picture.

Would you care to comment, sir, as to whether you think a common-law-precedent approach would be sufficient?

Mr. NIXON. I do not believe it is sufficient, and I would suggest that for the President of the United States making decisions, decisions that affect not only the foreign policy of this country but affect business relationships of immense complexity, that I can imagine what a field day this would be for lawyers if this common-law-decision or this common-law-practice argument were to be made.

Speaking as a lawyer, and not downgrading the profession but recognizing its great skill in raising questions whenever there is any technical constitutional problem, I would urge the committee to reject that argument and, at the very least, see that that or its essence be written into law. I would prefer a constitutional amendment.

Senator BAYH. Could I ask you, sir, to compare the approach which is suggested by the two specific amendments which are presently before this committee. One has been offered by the distinguished Senator from New York, Senator Keating, from whom we read a statement in the record prior to your presence, specifying that he was very sorry he was unable to be here because of the tragic death of Mrs. Wagner which required him to be in New York.

The other approach is the approach which Senator Fong and I have espoused and which has been suggested as an approach by the American Bar Association and some other organizations. I don't want to argue about the specific proposals but rather the general approach to constitutional amendments which you would deem preferable. One approach is a very simple approach which would not spell out any specifics whatever but would merely say to the Congress, "You have the authority to act."

The other approach specifies specifically chapter and verse point by point what would be the actual law in the event of a tragedy or disability.

The feeling is, on the one hand, that only a simple solution giving no specific points at all would be adopted by the majority or three-fourths of the legislatures.

The other argument for the more complicated and specific amendment is that really the legislatures would rather have a point-by-point specification of what would be the law rather than a blank check given to Congress to act in this area.

Could you give us your opinion as to which approach you would prefer in the constitutional amendment form?

Mr. NIXON. The approach I would prefer is the one that this committee finally concludes has the best chance to success. I think either approach insofar as workability is concerned in handling the problem would be effective.

In other words, I emphasize again that all of the nit-picking arguments as to whether it should be this way or that way make very little impression on me. What I think is—I think our major concern must be—is to find a solution that will be least controversial but will get at the major problem.

Now, as far as I personally am concerned, looking at it as a lawyer, I would say that I would prefer the simpler approach rather than the one spelling out the procedure. I find that, I am just thinking now, of what I think might get across and what would be explained to the State legislatures that have to approve a constitutional amendment?

My own evaluation of that political problem would be that the simpler approach would raise less questions.

The more you spell out the proposal, the more chance you raise for arguments and disagreements with regard to it.

The other thing I would say is this: That by not—when you are writing the Constitution, you are, of course, dealing with a document in which changes cannot be made very easily. I would say that with a simple approach then, the Congress, as it developed its procedures to deal with this particular problem might then have more flexibility to change those procedures where it found that one was too rigid.

Senator BAYH. In the simple approach which you describe would you have us write the basic fundamental of procedure? That the President would, in writing, specify his disability, that the Vice President would, in fact, be Acting President and would assume the powers and duties but not the office, that the Vice President would assume these duties if the President were unable himself to make this declaration? Would these be specifics that you would include?

Mr. NIXON. By all means. Of course, I assume that all of those particular items would be included in the constitutional amendment. But what I was referring to was the procedure that the Congress would go through in the event there were an argument between the President and the Vice President as to whether or not a President had recovered from disability.

In that respect I would not attempt to spell out the procedure that the Congress should follow.

Senator BAYH. You pointed out, if I may change directions just a bit, the importance of the Vice Presidency today. The Vice President is one heartbeat away from the Chief Executive authority of this land, and the best successor to the President is indeed the Vice President.

You pointed out also that the Vice President does have a job to do today. There has been some conflict as to whether we actually need a Vice President to perform duties to relieve the burdens presently resting on the shoulders of the President. Could we call on your experience, sir, to give us a general idea of what these duties are? How this constitutes an active, vigorous, working office today?

Mr. NIXON. Well, it is rather difficult to summarize the duties of the Vice President because, of course, those duties vary with everyone who holds the office. I would say that the least burdensome duty is, of course, the one that is included in the Constitution, of presiding over the Senate, and breaking tie votes.

For example, in the 8 years that I was Vice President, I cast a tie vote on only eight occasions, one a year, on an average.

I think that the important duties of the Vice President are: first, his participation in the deliberations of the National Security Council; his participations in the deliberations of the Cabinet; and then the increasingly great use of the Vice President as a troubleshooter and as a representative of the President abroad in the field of foreign policy.

Apart from those duties, we, of course, have those specific commissions that the President has on occasion called upon the Vice President to perform. For example, the Committee on Government Contracts in President Johnson's case, the Space Committee and others.

What I would like to suggest here is perhaps a little different approach. I believe that now that the pattern has begun of a President giving more functions to the Vice President, I see that that pattern can be very greatly expanded in the years ahead, because the burden of the Presidency, particularly with the foreign policy problems becoming more acute than they had been previously, are so great that the Vice President can and should be used more even than he has been in either the Kennedy or the Eisenhower administration.

That brings me, of course, to the other key point: the fundamental reason why the President should in effect name or have a veto power on who holds the office of Vice President is that a Vice President can only be as useful as a President has confidence in him, and only when a Vice President is compatible with the President's views can that be the case. That is why, for example, that I oppose in these modern times, as the Vice Presidency has assumed these new proportions, the so-called ticket balancing theory in national conventions.

I would hope, for example, that both national conventions this year, both the Republican and the Democratic Conventions would think in terms of nominating two Presidents, in effect, having in mind that either of the men nominated for Vice President on either ticket could be President, but more than that, having in mind the fact that it is most essential to nominate for the second spot a man who as nearly as possible represents the views of the President, so that he can carry out the functions of the Presidency in the event he succeeds to that office, but more than that so that as Vice President the President can trust him in foreign policy and domestic policy to take very important assignments.

Let me say in that connection, I know that Senator Keating has a proposal for setting up the two Vice Presidents. I would prefer that proposal incidentally over those that would change the succession law back to the Speaker of the House or something like that. But one of the reasons I oppose that proposal, and I have great respect for Senator Keating—we came to the Congress together and I consider him one of the top constitutional lawyers in the country—but one of the reasons I oppose it, right at this period, when the office of Vice President has come to mean something, we shouldn't downgrade it.

I had a little amusing incident on that in New York a couple of nights ago. There is an organization which is somewhat like the Gridiron Club in Washington, was giving a party in honor of a former Vice President, and the speaker or the chairman of the meeting said that this organization in previous years had honored many former Presidents of the United States and Secretaries of State but this is the first time they had ever honored a Vice President.

Everybody cheered, of course, at that particular reference and then the next speaker who was—who had the duty of getting up to introduce me, who was, of course, the guest of honor said—well, he happened to be the president of a major New York bank, and he said, “Well, I can’t say that I am a bit impressed about the fact we are honoring a Vice President today.”

He said, “After all, I head an organization that has 243 vice presidents. [Laughter.]

Now, I know that in traveling abroad, for example, the United Arab Republic has four Vice Presidents. Several Latin American republics have two, and the moment that you have more than one Vice President, the usefulness of the Vice President to the Nation has been greatly reduced.

Senator BAYH. May I ask you one other question in this regard? I personally share your feeling about the importance of not decreasing the significance which has been attached to the Vice Presidency.

Do you see a possibility of decreasing the significance of the Vice President? Is there a possibility, with human beings being what they are, and conflicts being what they are, of a conflict between two Vice Presidents? And is there a possibility of a conflict arising between the President and his Vice Presidents?

Mr. NIXON. Well, as a matter of fact, that is not only the reason I oppose the proposal for two Vice Presidents but I also do not approve of the proposal that I understand has been made by Governor Rockefeller for setting up the First Secretary, a position of First Secretary of the Cabinet.

The trouble with the position of First Secretary of the Cabinet who would be next in line in succession to the Vice President is that first his would be an appointive office, and I do not like the idea of an appointive office succeeding to the Presidency, but the second point that I would make is this: the moment you set up a First Secretary of Cabinet you are going to downgrade, in the field of foreign affairs particularly, the Secretary of State, and at the present time, for example, I feel strongly that the Office of Secretary of State rather than being downgraded ought to be upgraded.

A strong Secretary of State in these times is very important to the country and particularly to the President of the United States, and the moment that nations abroad, diplomats abroad, get the impression that the Secretary of State is not a strong member of the administration, and close to the President, and the President’s top foreign policy adviser, his effectiveness is greatly reduced.

Senator BAYH. I don’t mean to monopolize this question-and-answer session.

Senator Fong, do you have any questions to ask the Vice President?

Senator FONG. Mr. Vice President, I am very happy to get you again in Washington. I want to thank you for appearing before this committee. You have given us great prestige by your presence here this morning. You certainly have shown us the necessity for urgency of the enactment of this type of legislation.

I want to congratulate you and commend you for the very clear, positive, definite, and comprehensive statement you have made to us this morning.

I want to say that you have given to this committee a lot of prestige and honor by your presence, and you have given to this proceeding great competence.

I have no questions of you. You have given us a very clear picture and I want to thank you for coming here today. I hope your stay in Washington will be permanent.

Mr. NIXON. Thank you, Senator. I want to say I am in a very new position in this respect. This is the first time in this room I have ever been on this side of the table and I am glad that I am here voluntarily and not under subpoena. [Laughter.]

Senator BAYH. Mr. Vice President, may I hold you long enough for another question or two?

Mr. NIXON. Yes, sir.

Senator BAYH. Are we agreed that in the event of disability that the powers and duties only would fall upon the Vice President?

Mr. NIXON. Exactly. I am glad the chairman raised this point. That is the proposal that has been made as I understand it by Attorney General, former Attorney General Rogers and former Attorney General Brownell and it is my position.

The office of the Presidency cannot devolve and the powers and the duties only should. Let me give one other reason why that, I think, is vitally important. Let us suppose that at a particular time a President was not completely disabled, but that he himself felt that his illness was so serious that it would be in the best interests of the country that, for, say, a short period of time, a week or so, that the Vice President undertake the powers and duties of the Presidency.

The President then would feel free to turn over those powers and duties to the Vice-Presidency if he knew at the end of that period he would be able to come back and assume the office.

I think it would be a great mistake to have the office devolve; only the powers and duties should.

Senator BAYH. One witness we had earlier in the hearings, Mr. Vice President, was primarily in agreement with the statement you just made. He went one step further to say that in the event of a certain kind of illness, a certain severity of illness—

Mr. NIXON. Yes.

Senator BAYH (continuing). That the Vice President would no longer then be acting President but would in fact assume the duties of the President.

His argument was that foreign policy being what it is, there is some benefit to be derived from the fact that there is an ultimate authority when a decision is made, and that uncertainty would be avoided.

Do you see a time in light of your experience when the illness would be so severe that the Vice President should in fact assume the office rather than just become acting President?

Mr. NIXON. Well, let's look back, I think we can only look to history to know. I would say that in President Wilson's period had Vice President Marshall assumed the powers and duties of the Presidency at that time, that he would have been recognized, perhaps, as the President in the full sense of the word.

But I don't believe that this still changes the attitude that I feel the committee should take with regard to whether the office or the powers and duties should devolve upon the Vice President.

Because of the uncertain nature of illnesses it will always depend on each case, and I think that by precisely pointing out that only the powers and duties devolve on the Vice President that gives the flexibility in each instance to handle the situation to deal with the particular problem.

There might be, I see possibilities, for example, like this, that the degree of powers and duties that devolve might vary depending upon the nature of the illness and I think that should be left open as well.

Senator BAYH. From your testimony as to the procedure and the safeguards and the checks and balances that you feel should be attendant in any legislation such as this, I trust that you agree that this business of removing even temporarily, the President of the United States is something not to be taken lightly and this is a serious matter.

Mr. NIXON. You can't treat the relationship of the United States like the relationship between the Governor and Lieutenant Governor of a State. As the committee knows, when a Governor leaves the State the Lieutenant Governor then has the power to commute sentences and do a lot of other things of that sort and then when the Governor comes back in the situation reverts to the previous state.

I believe that where the Presidency is concerned, this power is so awesome, and particularly where foreign policy is involved so decisive and critical that you naturally cannot move lightly from the position where a Vice President steps in and steps out. It can't be musical chairs, in other words, and I would say, I would suggest, too, this, that no Vice President is going to get the approval of the members of the Cabinet for this momentous step unless it is a very serious situation, and no President, for example, is going to turn over the powers and duties of the Presidency. A man, for example, who is immersed in all the problems of our foreign relations and our domestic problems is not going to, every time he gets a stomachache, say, "Well, I am going to resign for a week," or "Resign the powers and duties and let the Vice President take over."

What I visualize here is that this proposal would only come into effect as a practical matter when the President's condition was desperately serious, and when because of that condition he honestly concluded or if he was unable to do so, the Vice President and the members of the Cabinet concluded that the country required a new hand on the wheel for a period of time.

Senator BAYH. Let me ask you one final question.

Mr. NIXON. Yes, sir.

Senator BAYH. Permit me to think out loud just a bit. On none of these questions do I take any issue with what you have said, but I think Senator Fong will agree that we are trying to get a solution when we come up with a final bill.

We would like to get more detail about some of the arguments which have been advanced.

Mr. NIXON. Yes.

Senator BAYH. You mentioned two ideas for ratifying bodies to ratify or confirm the nomination of a new Vice President.

Would you care to discuss very briefly the two main stumbling blocks that seem to be in the minds of most people as far as both of these alternatives are concerned? First, 20 percent of the time we have had a divided Congress, divided in political authority and responsibility from the President.

Do you feel that tradition has shown that even in these incidents that the Congress has not been reluctant, by and large, to confirm nominations that have been made by the Executive? That public pressure would be great and certainly it would be difficult for even a President of the United States to become involved or the Congress to become involved in political interparty play?

If you feel it would still be more desirable to use the electoral college, how would you go about upgrading the electoral college in the eyes of the people? If this were upgraded in the immediate future, would it again be downgraded if, as we hope, we did not need it for this purpose for a long time? How would you fill vacancies which might exist in the electoral college?

These are things which you might just touch on briefly. This would be the final question.

Mr. NIXON. Yes. Briefly, I would say as far as the Congress is concerned, and this is the reason that I made the electoral college suggestion, there have been 16 administrations in which a President has had an opposition Congress.

Now, being quite specific, let's think of what might have happened in 1946 when the 80th Congress, with an overwhelming Republican majority, came in, when Mr. Truman was President of the United States. It would seem that there could have been problems there particularly where the Congress and the President were at odds.

Now, I will have to, however, also take into account more recent history, I think of the very proper but also outstanding manner in which the Congress, both Republicans and Democrats, accepted the transition from President Kennedy to President Johnson.

What we have to have in mind here is that when this appointment is made, when the Presidency, when the office of Vice President, becomes vacant, it is made in one of two circumstances. It is made when a Vice President dies or when a President dies. Now, when a President dies, I would say that the feeling in the country, the immense emotional impact at the death of a President, certainly by assassination and even by normal causes, is such that his successor would probably get broad support even from an opposition Congress.

Being a lawyer, of course, what I was trying to do was to find another electoral device where there was no problem at all, and, of course, we know the electoral college is always, a majority of the electoral college is, of the President's own party.

But looking more closely at more recent events, I would say that the likelihood of a Congress bucking a President, a new President of the United States, even if it were an opposition Congress, probably is not as great as many of us would have feared. Now, the second point, however, it might be a little more difficult. Let's suppose a Vice President died in office, then there isn't the emotional impact on the country that there would be if the President dies.

In this instance, I would say that the opposition Congress factor might be a more real one, a more serious one. But going a step further, I still believe that the important thing here is not whether it is the electoral college or the Congress, but the important thing is to get one or the other, which is the consensus of the members of this committee and which this committee thinks will get the broadest public approval. Either solution is a great improvement over what we have at the present time and either, I think, over a period of time would work.

I happen to believe the electoral college system would work better.

How about vacancies in the electoral college? Those would be filled by State law, the United States Code so provides today and, for example, we have that situation today.

The members of the electoral college, of course, are selected months before the time when the electoral college convenes in the various States, and they would be filled in the event of vacancies by State law now, and if, for example, they were called upon for this extraordinary function, State law would again provide, would again prevail.

As far as what would happen on the electoral colleges' approval of the choice of a President, I have already indicated that there is a certainty in this instance, because of the very nature of the electoral college which you do not have with regard to the Congress.

But all in all, in summary, I get back to my original proposition that the electoral college, the Congress, the two Vice President proposals, all of these are before this committee. The important function of this committee, as I see it, is to get action, to consider the recommendations and the pet ideas of the many witnesses you have heard, and to seize the idea that in your opinion, is to get the best idea in your opinion, and to get the public support and go forward with it.

And speaking as one individual, whatever this committee recommends I will support because I believe the important thing is to get action and to get it fast.

STATEMENT OF HON. NICHOLAS deB. KATZENBACH, ATTORNEY GENERAL-DESIGNATE OF THE UNITED STATES; ACCOMPANIED BY NORBERT SCHLEI, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL

Attorney General KATZENBACH. Thank you very much for your statement. I have a prepared statement here. It is likely to take about 15 minutes for me to read it. Would you like me to do that or would you prefer to have me answer questions?

Senator BAYH. We shall let you use your own judgment. We are most anxious to have your thoughts, because in addition to having been Assistant Attorney General, you have studied this problem in some detail and I would rely on your judgment completely as to how you want to present your testimony before the committee. You may read your statement, paraphrase it, expand upon it, however you prefer.

Attorney General KATZENBACH. Thank you, Mr. Chairman.

I would like also to note that I am accompanied by Mr. Norbert Schlei, who is the Assistant Attorney General in charge of the Office of Legal Counsel.

Senator BAYH. We are glad to have Mr. Schlei with us.

Attorney General KATZENBACH. I am privileged to appear before this subcommittee in support of Senate Joint Resolution 1, a proposal which would amend the Constitution in order to remedy two critical deficiencies. The proposed amendment would, first, clarify the situation that would exist in the event that the President should become disabled and, second, provide a means for filling vacancies in the office of Vice President.

The subcommittee may recall that in 1963, I testified on several proposed amendments to the Constitution relating to cases where the President is unable to discharge the powers and duties of his office. Last year the subcommittee continued its efforts and approved a bill identical with Senate Joint Resolution 1 which was passed by the Senate. Since the subcommittee has already made a comprehensive study of this matter, I shall do no more today than to state fairly briefly what we understand Senate Joint Resolution 1 proposes to do and what the Department's views are respecting it.

At the outset, before considering the specific provisions of Senate Joint Resolution 1, I want to reaffirm my prior position that the only satisfactory method of settling the problem of Presidential inability is by constitutional amendment, as Senate Joint Resolution 1 proposes. The same of course is true of the problem of filling vacancies in the office of Vice President. I recognize that there are distinguished scholars who are of the opinion that Congress has power to act in the matter of Presidential inability under the "necessary and proper" clause (art. 1, sec. 8, clause 18), and that a statute would therefore suffice as a solution. There is, however, equally distinguished opinion, including that of the last three Attorneys General, for the proposition that the problem can be adequately resolved only by constitutional amendment. And as a practical matter, if what we want is to assure continuity in Executive leadership—and if what we want to avoid is uncertainty, confusion, and dissension at the very time of crisis—then in my judgment a statute would not provide a satisfactory solution. So I fully agree with the constitutional amendment route marked out by Senate Joint Resolution 1.

THE PROBLEM OF PRESIDENTIAL INABILITY

Article II, section 1, clause 6 of the Constitution provides as follows:

In case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

It is generally agreed that this provision no longer poses any legal problem in the event of the death of a President. As a matter of historical practice, first established by John Tyler and followed by seven other Vice Presidents, the Vice President becomes President in such a contingency. Section 1 of the Senate Joint Resolution 1 confirms this practice in the case of death and extends the same principle to the case of removal of, or resignation by, the President. Under section 1, therefore, the Vice President would become President and be sworn in as President in the event of the latter's removal, death, or resignation. I can see no objection whatever to section 1.

With respect to the problem of presidential inability, there is no similar settled practice because, of course, so far in our history no Vice President has ever exercised the powers and duties of the Presidency during a period of Presidential inability. It is true that the identical Eisenhower-Nixon, Kennedy-Johnson, Johnson-McCormack, and Johnson-Humphrey understandings as to these matters, supported as they are by the views of the last three Attorneys General, have gone far toward establishing a settled practice. These informal understandings, however, leave much to be desired as a means of resolving such fundamental questions, and in any case they make no provision for the situation that would exist if the President and Vice President were to disagree on the question of inability. Accordingly, it is clear that what we need at this time is a lasting and complete solution to the key questions which are apt to arise under the ambiguous language of article II, section 1, clause 6 of the Constitution when a President suffers inability. The first is whether it is the "Office" of the President, or the "Powers and Duties" of that Office, which devolve upon the Vice President in the event of presidential inability. The second is who shall raise the question of "Inability" and make the determination as to when it commences and when it terminates.

The great majority of constitutional scholars have expressed the opinion that upon a determination of Presidential inability, the Vice President succeeds only temporarily to the powers and duties of the office and does not permanently become President. This has been the unanimous view of Attorneys General of both Republican and Democratic administrations for at least the last decade. Similarly, the majority of scholars are agreed that the Vice President has constitutional authority to make the initial determination of Presidential inability, and that the President has the authority to determine when his inability is at an end. My own judgment and that of many Attorneys General is that this is so. However, enough doubt has existed on these subjects in the past that several Vice Presidents

have been deterred from acting as President when the President was temporarily disabled. As you will recall, this happened most dramatically during the prolonged illnesses of Presidents Garfield and Wilson, when the country was left without leadership and decisions were made, to the extent that they were made at all, in a questionable manner.

The events of the last decade show us all too clearly how quickly disability can strike. We cannot afford to assume that our good fortune in the past will continue in the future. If a similar tragedy should occur while section 3 of Senate Joint Resolution 1 is in effect, it would not only fix beyond dispute the status of the Vice President as Acting President when he is discharging the powers and duties of a disabled President, it would also give the President a firm constitutional guarantee that he could reassume these powers and duties as soon as his inability has ended. On this basis, a President who is sick, or about to undergo an operation which will temporarily incapacitate him, will not hesitate to announce his inability, nor will a Vice President be unduly slow to act if an emergency situation of this kind demands it.

The extraordinary situations—where the President cannot or does not declare his own inability, or where a dispute exists between the President and Vice President as to whether inability exists—are covered by sections 4 and 5 of Senate Joint Resolution 1.

Section 4 provides that if the President does not declare his inability, the Vice President with the written concurrence of a majority of the heads of the executive departments (that is, the members of the Cabinet) or such other body as Congress might by law provide, may transmit to Congress his written declaration that the President is disabled, and immediately assume the powers and duties of the office as Acting President. Section 5 provides that the President can resume the powers and duties of his office by transmitting to the Congress his written declaration that his inability has ended. If, however, the Vice President does not agree that the President's inability has ended, section 5 further provides that the Vice President can, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress might by law provide, within 2 days so advise Congress. Thereupon Congress would be required immediately to decide the issue. A two-thirds vote of both Houses would be necessary to keep the President out and permit the Vice President to continue to act as Acting President. If the Vice President could not muster a two-thirds vote in each

House in favor of a determination of continuing Presidential inability, the President would resume the powers and duties of his office.

As the subcommittee knows all too well, the factual situations with which Senate Joint Resolution 1 is designed to deal are numerous and complex. Inevitably, therefore, some aspects of Senate Joint Resolution 1 will raise problems of ambiguity for some observers. As the chairman noted at the outset, it is almost impossible to please everyone with respect to every problem that can come up in this situation. In order to assist in minimizing any such ambiguity, I would like to set forth the interpretations I would make of the proposed amendment in several difficult areas so that the subcommittee may have an opportunity to consider whether clarification is needed.

First, I assume that in using the phrase "majority vote of both Houses of Congress" in section 2, and "two-thirds vote of both Houses" in section 5, what is meant is a majority and two-thirds vote, respectively, of those Members in each House present and voting, a quorum being present. This interpretation would be consistent with long-standing precedent (see, that is, *Missouri Pac. Ry. Co. v. Kansas*, 248 U.S. 276 (1919)).

Second, I assume that the procedure established by section 5 for restoring the President to the powers and duties of his Office is applicable only to instances where the President has been declared disabled without his consent, as provided in section 4; and that, where the President has voluntarily declared himself unable to act, in accordance with the procedure established by section 3, he could restore himself immediately to the powers and duties of his Office by declaring in writing that his inability has ended. The subcommittee may wish to consider whether language to insure this interpretation should be added to section 3.

Third, I assume that even where disability was established originally pursuant to section 4, the President could resume the powers and duties of his Office immediately with the concurrence of the Acting President, and would not be obliged to await the expiration of the 2-day period mentioned in section 5.

Fourth, I assume that transmission to the Congress of the written declarations referred to in section 5 would, if Congress were not then in session, operate to convene the Congress in special session so that the matter could be immediately resolved. In this regard, section 5 might be construed as impliedly requiring the Acting President to convene a special session in order to raise an issue as to the President's inability pursuant to section 5.

Further in this connection, I assume that the language used in section 5 to the effect that Congress "will immediately decide" the issue means that if a decision were not reached by the Congress immediately, the powers and duties of the Office would revert to the President. This construction is sufficiently doubtful, however, and the term "immediately" is sufficiently vague, that the subcommittee may wish to consider adding certainty by including more precise language in section 5 or by taking action looking toward the making of appropriate provision in the rules of the House and Senate.

In my testimony during the hearings of 1963, I expressed the view that the specific procedures for determining the commencement and termination of the President's inability should not be written into the Constitution, but instead should be left to Congress so that the Constitution would not be encumbered by detail. There is, however, overwhelming support for Senate Joint Resolution 1, and widespread sentiment that these procedures should be written into the Constitution. The debate has already gone on much too long. Above all, we should be concerned with substance, not form. It is to the credit of Senate Joint Resolution 1 that it provides for immediate, self-implementing procedures that are not dependent on further congressional or Presidential action. In addition, it has the advantage that the States, when called upon to ratify the proposed amendment to the Constitution, will know precisely what is intended. In view of these reasons supporting the method adopted by Senate Joint

Resolution 1, I see no reason to insist upon the preference I expressed in 1963 and assert no objection on that ground.

I might add, Mr. Chairman, it would be a courageous man who would take issue with 75 Senators.

FILLING THE VACANCY IN THE OFFICE OF VICE PRESIDENT

Related to the problem of Presidential inability is the equally critical problem of a vacancy in the office of Vice President. Too often it is overlooked that the country has been without a Vice President 16 times—in almost half of the 36 administrations in the history of the Nation. In an age marked by crisis, we can no longer afford such a gap in the high command of the executive branch of the Government. Today more than ever, the working relationship between the President and Vice President has become increasingly close; the burdens of the Presidency and the exigencies of our time leave no other alternative. The need is therefore manifest for a constitutional amendment to assure that the office of Vice President will never again remain vacant.

In my opinion, Senate Joint Resolution 1 embodies a highly satisfactory solution to this problem. Section 2 would amend the Constitution to provide that whenever there is a vacancy in the office of Vice President the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Permitting the President to choose the Vice President, subject to congressional approval, in the event of a vacancy in that office, will tend to insure the selection of an associate in whom the President has confidence, and with whom he can work in harmony. Participation by Congress in the procedure should help to insure that the person selected would be broadly acceptable to the people of the Nation.

At this time, I wish to pay my respects to the members of this subcommittee, whose combined effort and scholarship have resulted in this important measure. Also, I wish to commend the Special Committee on Presidential Inability of the American Bar Association, and similar committees of State and city bar associations, who have in recent years helped to focus attention and to rally public support for resolving these problems promptly.

It seems clear that Senate Joint Resolution 1 represents as formidable a consensus of considered opinion on any proposed amendment to the Constitution as one is likely to find. It may not satisfy in every respect the views of all scholars and statesmen who have studied the problem. For that matter, I doubt that any proposal could ever fully satisfy everyone in this troublesome area. But, it seems to me evident that, as President Johnson said yesterday, Senate Joint Resolution 1 "would responsibly meet the pressing need * * *."

I understand that 47 State legislatures will be in session this year. Given the opportunity, I believe that many of these State legislatures will be able to ratify the necessary constitutional amendment if Congress acts without delay. I earnestly recommend such action.

Senator BAYH. Thank you, very much, Mr. Attorney General, for your statement. I am sure that this will add a great deal not only

to the record but to our study of this amendment as we try to go further to find imperfections which can be improved.

In my haste in trying to get the committee underway, I have breached a bit of committee etiquette by not making introductions of my colleagues, the distinguished Senators from Illinois, Nebraska, Hawaii, and Maryland. They have all made a contribution and I am sure they will all want to make a statement, but because of the press of time on the Attorney General, I have moved right ahead. We may ask a question or two based on this very enlightening testimony.

First, without objection, I would like to suggest that the very articulate message sent to Congress by the President yesterday be submitted into the record at this time.

(The statement of President Johnson, previously referred to follows:)

[Released by Office of the White House Press Secretary, Jan. 28, 1965]

THE WHITE HOUSE.

To the Congress of the United States:

In 1787, Benjamin Franklin remarked near the conclusion of the Constitutional Convention at Philadelphia, "It * * * astonishes me, sir, to find this system approaching so near to perfection as it does * * *."

One hundred seventy-eight years later the relevance of that Constitution of 1789 to our society of 1965 is remarkable. Yet it is truly astonishing that, over this span, we have neither perfected the provisions for orderly continuity in the executive direction of our system nor, as yet, paid the price our continuing inaction so clearly invites and so recklessly risks.

I refer, of course, to three conspicuous and long-recognized defects in the Constitution relating to the office of the Presidency:

1. The lack of a constitutional provision assuring the orderly discharge of the powers and duties of the President—Commander in Chief—in the event of the disability or incapacity of the incumbent.

2. The lack of a constitutional provision assuring continuity in the office of the Vice President, an office which itself is provided within our system for the primary purpose of assuring continuity.

3. The lack of a constitutional provision assuring that the votes of electors in the electoral college shall without question reflect the expressed will of the people in the actual election of their President and Vice President.

Over the years, as I have noted, we have escaped the mischief these obvious omissions invite and permit. Our escape has been more the result of Providence than of any prudence on our part. For it is not necessary to conjure the nightmare of nuclear holocaust or other national catastrophe to identify these omissions as chasms of chaos into which normal human frailties might plunge us at any time.

On at least two occasions in our history, and perhaps others, American Presidents—James Garfield and Woodrow Wilson—have, for prolonged periods, been rendered incapable of discharging their Presidential duties. On 16 occasions, in our 36 administrations, the office of Vice President has been vacant and over the two perilous decades, since the end of the Second World War, that vital office has been vacant the equivalent of 1 year out of 4. Finally, over recent years, complex but concerted campaigns have been openly undertaken—fortunately without success, as yet—to subvert the electoral college so that it would register not the will of the people of individual States but, rather, the wishes of the electors themselves.

The potential of paralysis, implicit in these conditions, constitutes an indefensible folly for our responsible society in these times. Commonsense impels, duty requires us to act, and to act now, without further delay.

Action is in the tradition of our forebears: Since adoption of the Bill of Rights—the first 10 amendments to our Constitution—9 of the 14 subsequent amendments have related directly either to the offices of the Presidency and Vice Presidency or to assuring the responsiveness of our voting processes to the will of the people. As long ago as 1804, and as recently as 1964, Americans have amended their Constitution in striving for its greater perfection in these most sensitive and critical areas.

I believe it is the strong and overriding will of the people today that we should act now to eliminate these unhappy possibilities inherent in our system as it now exists. Likewise, I believe it is the consensus of an overwhelming majority of the Congress—without thought of partisanship—that effective action be taken promptly. I am, accordingly, addressing this communication to both Houses to ask that this prevailing will be translated into action which would permit the people, through the process of constitutional amendment, to overcome these omissions so clearly evident in our system.

I. PRESIDENTIAL INABILITY

Our Constitution clearly prescribes the order of procedure for assuring continuity in the office of the Presidency in the event of the death of the incumbent. These provisions have met their tragic tests successfully. Our system, unlike many others, has never experienced the catastrophe of disputed succession or the chaos of uncertain command.

Our stability is, nonetheless, more superficial than sure. While we are prepared for the possibility of a President's death, we are all but defenseless against the probability of a President's incapacity by injury, illness, senility, or other affliction. A nation bearing the responsibilities we are privileged to bear for our own security, and the security of the free world, cannot justify the appalling gamble of entrusting its security to the immobilized hands or uncomprehending mind of a Commander in Chief unable to command.

On September 29, 1964, the Senate passed Senate Joint Resolution 139, proposing a constitutional amendment to deal with this perplexing question of Presidential disability as well as the question, which I shall discuss below, of filling vacancies in the office of Vice President. The same measure has been introduced in this Congress as Senate Joint Resolution 1 and House Joint Resolution 1. The provisions of these measures have been carefully considered and are the product of many of our finest constitutional and legal minds. Believing, as I do, that Senate Joint Resolution 1 and House Joint Resolution 1 would responsibly meet the pressing need I have outlined, I urge the Congress to approve them forthwith for submission to ratification by the States.

II. VACANCY IN THE OFFICE OF THE VICE PRESIDENT

Indelible personal experience has impressed upon me the indisputable logic and imperative necessity of assuring that the second office of our system shall, like the first office, be at all times occupied by an incumbent who is able and who is ready to assume the powers and duties of the Chief Executive and Commander in Chief.

In our history, to this point, the office of the President has never devolved below the first clearly prescribed step of constitutional succession. In moments of need, there has always been a Vice President; yet, Vice Presidents are no less mortal than Presidents. Seven men have died in the office and one has resigned, in addition to the eight who left the office vacant to succeed to the Presidency.

We recognized long ago the necessity of assuring automatic succession in the absence of a Vice President. Various statutes have been enacted at various times prescribing orders of succession from among either the presiding officers of the Houses of Congress or the heads of executive departments who, together comprise the traditional Cabinet of the President. In these times, such orders of succession are no substitute for an office of succession.

Since the last order of succession was prescribed by the Congress in 1947, the office of the Vice President has undergone the most significant transformation and enlargement of duties in its history.

Presidents Truman, Eisenhower, and Kennedy have successively expanded the role of the Vice President, even as I expect to do in this administration.

Once only an appendage, the office of Vice President is an integral part of the chain of command and its occupancy on a full-time basis is imperative.

For this reason, I most strongly endorse the objective of both Senate Joint Resolution 1 and House Joint Resolution 1 in providing that, whenever there is a vacancy in the office of Vice President, provision shall exist for that office to be filled with a person qualified to succeed to the Presidency.

III. REFORM OF THE ELECTORAL COLLEGE SYSTEM

We believe that the people should elect their President and Vice President. One of the earliest amendments to our Constitution was submitted and ratified in

response to the unhappy experience of an electoral college stalemate which jeopardized this principle. Today, there lurks, in the electoral college system, the ever-present possibility that electors may substitute their own will for the will of the people. I believe that possibility should be foreclosed.

Our present system of computing and awarding electoral votes by States is an essential counterpart of our Federal system and the provisions of our Constitution which recognize and maintain our Nation as a Union of States. It supports the two-party system which has served our Nation well. I believe this system should be retained. But it is imperative that the electoral votes of a State be cast for those persons who receive the greatest number of votes for President and Vice President—and for no one else.

At the same time, I believe we should eliminate the omission in our present system which leaves the continuity of the offices of President and Vice President unprotected if the persons receiving a majority of the electoral votes for either or both of these offices should die after the election in November and before the inauguration of the President. Electors are now legally free to choose the President without regard to the outcome of the election. I believe that if the President-elect does under these circumstances, our laws should provide that the Vice President-elect should become President when the new term begins. Conversely, if death should come to the Vice-President-elect during this interim, I believe the President-elect should, upon taking office, be required to follow the procedures otherwise prescribed for filling the unexpired term of the Vice President. If both should die or become unable to serve in this interim, I believe the Congress should be made responsible for providing the method of selecting officials for both positions. I am transmitting herewith a draft amendment to the Constitution to resolve these problems.

Favorable action by the Congress on the measures here recommended will, I believe, assure the orderly continuity in the Presidency that is imperative to the success and stability of our system. Action on these measures now will allay future anxiety among our own people, and among the peoples of the world, in the event senseless tragedy or unforeseeable disability should strike again at either or both of the principal Offices of our constitutional system. If we act now, without undue delay, we shall have moved closer to achieving perfection of the great constitutional document on which the strength and success of our system have rested for nearly two centuries.

LYNDON B. JOHNSON.

THE WHITE HOUSE, *January 28, 1965.*

STATEMENT OF HERBERT BROWNELL, PRESIDENT, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Mr. BROWNELL. Mr. Chairman and Senator Keating, I have a brief statement. Is it all right if I read it?

Senator BAYH. Fine.

Mr. BROWNELL. Presidential disability and the related question of presidential succession constitutes major constitutional problems. Every thoughtful citizen will welcome the intensive efforts of your committee to resolve them. Our very survival in this age may rest upon the capacity of the Nation's Chief Executive to make swift and unquestioned decisions in an emergency. Therefore, it becomes of critical importance to provide the machinery for such decisions at the time of temporary presidential inability to discharge the powers and duties of the Presidency.

As has been mentioned before this morning, students of the Constitution have differed for many years over the meaning of the paragraph in the U.S. Constitution which deals with presidential disability. The Senate Judiciary Committee has in the past collected the data from relevant researches which have been carried on, from which I believe it is reasonably clear that it was the original intention of the framers of the Constitution to have the Vice President on his own initiative assume only powers and duties of the Presidency, not the Office of President, during any period of presidential disability. But one cannot ignore the fact that a division of opinion has existed and still exists over the constitutional validity of a temporary devolution of presidential power.

In other words, some persons insist that the Vice President takes over as President for the balance of the presidential term. It is probable, certainly it is possible, that in any future crisis concerning presidential disability the same conflicts in opinion would arise. History and logic demonstrate that if a Vice President is to take the monumental step of assuming the powers of the Presidency even for a specific temporary period, he must do so by reason of unquestioned authority that satisfies public opinion.

Ordinary legislation, without a constitutional amendment, would only throw one more doubtful element into the picture for the validity of such a statute could not be tested until the occurrence of the presidential disability, at the very time at which uncertainty must be precluded. The simple fact is that no mere statute can alter, transfer, or diminish vested constitutional power. Even a statute which sought to do nothing more than declare the original intent of the framers would have to be construed in the light of previous constitutional interpretations and the precedents based on those interpretations, and would therefore be valueless in resolving doubt and uncertainty.

The first point I would make, therefore, is that a constitutional amendment, not merely a new statute, is necessary to solve the presidential disability problem.

Many persons who have considered this problem have assumed that its most important aspect is the factual determination of presidential inability. But the history of 170 years shows no real difficulty attends the determination of when or whether a President is unable to perform the duties of his Office. The crux of the constitutional problem has been, and I believe will be, to insure that the Vice President can take

over with unquestioned authority for a temporary period when the President's disability is not disputed, and that the President can resume Office once he has recovered.

So long as there is a lingering doubt as to whether the Vice President, in the event of presidential disability, assumes not merely the powers and duties of the Presidency, but the Office itself, our history has shown that a Vice President will not in fact act to assume the powers and duties of the Office for fear that he will be accused of illegally ousting the President from Office during the balance of his term.

I support the proposed solution of this problem as presently set forth in Senate Joint Resolution 139 by Senator Bayh, which states that if the President shall declare in writing that he is unable to discharge the powers and duties of his Office, such powers and duties shall be discharged by the Vice President as Acting President.

Here I might interpolate the point sometimes overlooked, that the President may be en route abroad or otherwise out of reliable communication for meeting an unexpected emergency and in such event he may wish for national security reasons to transfer to the Vice President the powers of his Office for a specified period, perhaps even for only a few hours.

Senate Joint Resolution 139 further provides that if the President does not so declare in writing, the Vice President, if satisfied that such inability exists, shall, with the written approval of a majority of the heads of the executive departments in office, assume the discharge of the powers and duties of the Office of Acting President. I also support the provisions of Senate Joint Resolution 139 as to the detailed machinery by which the President would resume the discharge of the powers and duties of his Office at the end of the period of disability.

The Vice President with the written approval of the heads of the executive departments may, however, declare that the disability has not terminated, whereupon Congress shall consider and decide the issue under the procedures that are set forth in Resolution 139.

I would like to make this point also: That ultimately the operation of any constitutional arrangement depends on public opinion and upon the public's possessing a certain sense of what might be called "constitutional morality." Absent this feeling of responsibility on the part of the citizenry there can be no guarantee against usurpation. No mechanical or procedural solution will provide a complete answer if one assumes hypothetical cases in which most of the parties are rogues and in which no popular sense of constitutional propriety exists.

I believe that the combination of the judgment of the Vice President and a majority of the Cabinet members appears to furnish the most feasible formula without upsetting the fundamental checks and balances between the executive, legislative and judicial branches of the Government.

By way of contrast, the advocates of some specially constituted group or commission to determine Presidential inability face many dilemmas. If the President is so incapacitated that it is obvious that he cannot declare his own inability, no need exists for a factfinding body. Nor is a factfinding body necessary if the President can and does declare his inability.

If, however, in a most unusual situation, the President and those around him differ as to whether he does suffer from a disability which he is unwilling to admit, then a critical dispute exists. But this dis-

pute should not be determined by a special commission composed of persons outside the executive branch. Such a commission almost regardless of its makeup runs a good chance of coming out with a split decision. What would be the effect, for example, if a commission of seven voted four to three that the President was fit and able for the time being, to perform the powers and duties of his office? What power could he exert during the rest of his term, by common knowledge, a change of one vote in the commission proceedings could yet deny him the right to exercise the powers of his office? If the vote were the other way and the Vice President were installed as Acting President, what powers could he exert when everyone would know that one vote the other way could cause him summary removal from the exercise of Presidential powers? If the man acting as President were placed in this awkward, completely untenable and impotent position, the effect on domestic affairs would be bad enough; the effect on the international position of the United States might well be catastrophic.

To summarize, my reasons for supporting the principles of Senate Joint Resolution 139 on Presidential disability are:

(1) It deals with the question by constitutional amendment rather than statute;

(2) It makes abundantly clear that when the President is disabled the Vice President takes over the powers and duties of the Presidency only as the Acting President for the period of the disability;

(3) It provides that the President may voluntarily declare his inability and that if he does not, the initial determination of fact shall be made within the executive branch—that is by the Vice President, on the written approval of a majority of the heads of the executive departments in office;

(4) The President may resume the powers and duties of the Presidency upon his own declaration that he is again able to handle them; the Vice President and majority of the heads of the departments in office may so certify, and in such event, Congress, in the final analysis, shall settle the disagreement.

Most important, this proposal achieves these goals in consonance both with the original intent of the framers of the Constitution and in consonance with the balance of powers among the three branches of our Government which is the permanent strength of the Constitution.

I have also been asked to comment on the proposed solutions for the problem of succession to the Presidency in the event that neither the President nor the Vice President is in office and able to exercise the powers and duties of the office. This problem, too, is a most important one and calls for prompt action. In my opinion it would be advisable to provide in the same constitutional amendment which deals with the question of Presidential disability, a provision that when a vacancy occurs in the Vice Presidency, steps shall be taken immediately, in a manner to be defined in the amendment, to fill the vacancy in the Vice Presidency for the unexpired term.

This would minimize the risk that our Nation will be faced with a situation where neither the President nor the Vice President is available. Of the various suggestions that have been made as to how to fill the Vice Presidency vacancy I support the solution set forth in Senate Joint Resolution 139 that the President shall nominate a person who, upon the approval of Congress, shall serve as Vice President for the unexpired term.

We are all familiar with the fact that at the regular quadriennial national conventions of our political parties, it is the practice of the conventions to turn to the newly nominated presidential candidate to ask him to choose the vice presidential candidate subject to convention approval. Under Senate Joint Resolution 139 the President would likewise be called upon to choose his second in command, but subject to congressional approval. In this way the public would be assured that the Vice President would be of the same political party as the President and would be someone who could presumably work in harmony with the basic policies of the President.

I am aware of the fact that suggestions have been made that the new Vice President should be chosen by the electoral college and, in theory, this plan has merit.

However, I am of the opinion that there are enough hazards involved in such a proposal as to make it an impractical solution. The use of the electoral college machinery would mean that the various States would have to work out methods of filling the vacancies which had occurred in the college since the preceding presidential election. Many procedural problems would also be involved in organizing an emergency convening of the electoral college. These would be cumbersome and time consuming and subject to legal challenge at a time when prompt action was called for. Presumably, some of the difficulties which I mention could be eliminated by careful framing of a plan to use the electoral college, but I see no way of eliminating two basic objections: (1) The delay would be greater than under the proposal set forth in Senate Joint Resolution 139, and (2) the person chosen by use of the electoral college machinery might not be compatible with the then President.

If the plan envisaged in Senate Joint Resolution 139 is adopted, that is, the President shall nominate a Vice President subject to approval by Congress, a major aspect of the succession problem will have been satisfactorily solved. There remains the possibility, however, that the Nation might be faced with a cataclysm under which neither a President nor Vice President is constitutionally available to discharge the powers and duties of the offices of President.

I believe, therefore, that the constitutional amendment covering the succession problem should provide that in such event, succession shall devolve upon the heads of the executive departments in the order of their establishment. This plan of succession was in effect during much of our national history until 1947. It has the advantage over the post-1947 succession plan of not involving the contemporaneous disruption of leadership of the legislative branch of the Government at a time when there is disruption in the leadership in the executive branch.

I recently participated in the Conference on Presidential Inability and Succession convened by the American Bar Association on January 20, 1964, the one that Professor Freund mentioned. This conference was composed of persons familiar with the constitutional problems we are discussing today. In the beginning, they differed widely in their views just as individual Senators probably do. But they all agreed that the dire necessities of promptly solving the problems outweighed their individual preferences. They agreed on the principles of a solution which are basically contained in the solution I have recommended. Their recommendations were later approved by

the house of delegates of the American Bar Association and, as I understand it, have also been approved by the Association of American Law Schools.

**STATEMENT OF LEWIS F. POWELL, JR., PRESIDENT-ELECT,
AMERICAN BAR ASSOCIATION**

Mr. POWELL. Thank you, Senator Bayh, Senator Keating.

My purpose this morning will be merely to supplement Craig's statement to the extent of presenting some of the reasons which led to the principal conclusions in the consensus report.

Mr. Craig has read the seven paragraphs in the consensus. I will not again read those.

First, I will deal with the five paragraphs which relate to presidential inability.

The first conclusion in the consensus requires no comment. It makes the obvious point that agreements between the President and the Vice President, while desirable under the circumstances, are not acceptable as a permanent solution to the inability problem.

The second consensus conclusion is an important one; namely, that an amendment to the Constitution should be adopted to resolve these problems. It is true that scholars differ as to whether a constitutional amendment is necessary, as many believe that the Congress now has the requisite authority to act, but a question of this magnitude and importance should not be resolved on a balancing of opinions. It would be unwise to follow a course which could leave the status of the Presidency subject to doubt and possible litigation, especially when another course is available.

We are concerned here with the very fundamentals of our Government, the office of President, and the exercise and continuity of Executive power.

These should be dealt with by an amendment to the Constitution itself.

The next three paragraphs of the consensus deal in principle with the provisions of such amendment to the Constitution. First, it should be made perfectly clear that in the event of the inability of the President, the powers and duties, but not the office, shall devolve upon the Vice President or person next in line of succession.

Such powers and duties shall so devolve for the duration of the inability of the President or until the expiration of his term of office.

The committee, of course, is familiar with the ambiguities in the sixth clause of section 1 of article II. Certain of these ambiguities have always been a source of difficulty and doubt. When President Tyler succeeded in 1841 to the office of President upon the death of William Henry Harrison, he set a precedent which has since been followed without question.

But such a precedent is of little value in the event of the inability, rather than death, of an incumbent President. The two noticeable instances of this inability, with which this committee is familiar, are in the cases of Presidents Garfield and Wilson. For eighty-some days preceding Garfield's death, and for perhaps as much as a year during Wilson's illness, there was a virtual void in Executive leadership.

The Vice Presidents then in office, Arthur and Marshall, were unwilling to assume the powers of President because of grave questions both as to their rights and as to the consequences of such an assumption. They were fearful, of course, that the Tyler precedent might be held to apply to inability as well as death.

It hardly need be said that in the current age, in which our country's responsibilities and dangers are incomparably greater, we can-

not afford to run the risk of a Garfield or Wilson situation. This awesome possibility was in the mind of every thoughtful person when the news was first flashed on November 22 that President Kennedy had been badly wounded.

In view of this recent and profoundly shocking experience, there is now widespread agreement that the constitutional amendment should at least clarify all doubts as to the development of the powers and duties. There is somewhat less agreement as to whether other provisions should be included in the constitutional amendment itself or should be left to legislation by Congress implementing the amendment.

Various proposals have been made and many of these have merit. The consensus report, following a careful review of alternatives by the conferees concluded that it was desirable for the amendment to be self-implementing on the basic points. The specific questions relate to determination of the fact of inability, when it commences and when it ends. In some instances, especially involving possible mental inability, these could be difficult and delicate questions.

The consensus report suggests that the amendment itself deal with these questions as follows:

In the event that the President does not make known his own inability by a declaration in writing, it may be established by action of the Vice President or the person next in line of succession, with the concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide.

It will be noted that this recommended procedure leaves the responsibility, in the absence of further action by the Congress, in the executive branch of the Government.

The conferees were strongly of the opinion that this is compatible with the separation of powers doctrine of the Constitution.

This procedure also has important practical advantages. It would enable prompt action by the persons closest to the President, and presumably most familiar with his condition. It would also tend to assure continuity and the least disruption of the functioning of the executive branch.

It is possible, of course, to have an independent commission make the decision rather than the Cabinet. This possibility was considered by the conferees, and a consensus was reached (for the reasons indicated above) that action by the Vice President with the concurrence of a majority of the Cabinet has significant advantages over other methods presented.

In the interests of providing flexibility for the future, the amendment would authorize the Congress to establish a different procedure if this were deemed desirable in light of subsequent experience.

The determination of when inability ends may be even more difficult than determining its commencement. If there is general agreement that the President has recovered, and he so declares in writing, there is no problem. But in the event the Vice President and a majority of the Cabinet (or such other body as the Congress may provide) should not agree with the President, the proposed amendment would then require that the question be determined by the vote of two-thirds of the elected members of each House of Congress.

It will be noted that if the President has declared in writing his ability to resume the powers and duties of his office, it is presumed that he is right. Thus, it would require the vote of two-thirds of the mem-

bers of each House of Congress to overrule such a Presidential declaration.

Obviously, vital principles of government are involved. The independence of the executive branch must be preserved, and a President who has regained his health should not be harassed by a possibly hostile Congress. Yet, there must be a means to protect the country from the situation (however remote) where a disabled President seeks to resume office. It is believed that the recommendation provides appropriate safeguards for and a proper balancing of the interests involved.¹

PRESIDENTIAL SUCCESSION

In the past, the American Bar Association has concerned itself primarily with the problem of Presidential inability. But in the discussions of the January conference, it became apparent that the subject of Presidential succession was of equal importance and also merited solution by constitutional amendment. The consensus contains the following recommendations, both of which have not been endorsed by the American Bar Association:

(a) The Constitution should be amended to provide that in the event of the death, resignation, or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term.

(b) It is highly desirable that the office of Vice President be filled at all times. An amendment to the Constitution should be adopted providing that when a vacancy occurs in the office of Vice President, the President shall nominate a person who, upon approval by a majority of the elected Members of Congress meeting in joint session, shall then become Vice President for the unexpired term.

The first recommendation merely confirms long-established precedent; namely, that in the event of death, resignation, or removal of the President, the Vice President (or the person next in line of succession) succeeds to the office of the President for the unexpired portion of the current term.

The second recommendation would provide, by constitutional amendment, for the prompt filling of the office of Vice President in the event it should for any cause become vacant.

It would provide, quite simply, that when a vacancy occurs in the Vice Presidency, the President shall nominate a person who, upon the approval by a majority of the elected Members of Congress meeting in joint session, shall become Vice President for the unexpired term.

It is true that this procedure would give the President the power to choose his potential successor. But with the safeguard of congressional approval, it is believed that this is sound in theory and in substantial conformity with current nominating practice. It is desirable that the President and Vice President enjoy harmonious relations and mutual confidence. The importance of this compatibility is recognized in the modern practice of both major parties in according the presidential candidate the privilege of choosing his running mate subject to convention approval. In the proposed amendment, the President would choose his Vice President subject to congressional approval.

Various other plans have been proposed, and several of these were

¹ The President may be removed by impeachment "for treason, bribery, or other high crimes and misdemeanors" (sec. 4 of art. II). The Senate tries impeachments, with the concurrence of two-thirds of the Members present necessary for conviction (clause 3 of art. I). But impeachment is hardly an appropriate proceeding in which to determine physical or mental inability.

considered by the conferees and also by the American Bar Association committee. It has been suggested that the electoral college be reconvened to fill the vacancy. But the electoral college today performs functions which are largely, if not wholly, ministerial. Unless there was a major revision in the electoral college system it is unlikely that a decision by it would command the requisite respect and support of the people. Moreover, the prompt filling of such a vacancy is desirable, and the reconvening of the electoral college might well involve significant delay.

It has also been suggested that a special election to fill the office of Vice President might be desirable. Here, again, there could be a serious question of delay. A special election by the people would be a new and drastic departure from our historic system of quadrennial presidential elections and would introduce various complications into our political structure.

In considering any proposal on this subject, it is well to keep in mind that the office of Vice President has indeed become one of the most important positions in our country. The days are long past when it was largely honorary and of little importance in itself. For more than a decade the Vice President has borne specific and important responsibilities in the executive branch of Government. In addition, he has to a large extent shared and participated in the executive functioning of our Government, so that, in the event of tragedy, there would be no break in the informed exercise of Executive authority.

As stated in the most recent report of the American Bar Association's Committee on Jurisprudence and Law Reform:

This committee concurs in the view of the Washington conference that it is highly desirable that the office of Vice President be filled at all times. We regard it as essential in this atomic age that there always be a Presidential successor who would be fully conversant with domestic and world affairs and who would be prepared to step into the higher office on short notice and to assume its full responsibilities with a minimum of interruption of the conduct of affairs of state.

Mr. Chairman and members of the subcommittee, it seems to the American Bar Association that the vital need is for action which will solve these grave problems of Presidential inability and succession.

Discussions of these problems have recurred down through the years, especially following events in history which dramatized the need for solutions. But even the interest aroused by the illnesses of President Eisenhower was not sufficient to bring about action. There has been a resurgence of interest, and indeed deep concern, since the assassination of President Kennedy, and once more responsible voices throughout America are calling for appropriate action. There has been little disagreement as to the need. The difficulty has been in obtaining a consensus as to how best to meet the need. Many proposals have been made, and many of these have undoubted merit.

But surely the time has come when reasonable men must agree on one workable method. It is not necessary, as the Washington conference agreed, that we find a solution free from all reasonable objection or which covers every conceivable situation. It is unlikely that such a solution will ever be found, as the problems are inherently complex and difficult.

It is the hope and strong recommendation of the American Bar Association, which we know is shared by this subcommittee, that past

differences be reconciled and that a solution be initiated by this session of the Congress. We urge that the solution be in the form of a proposed constitutional amendment, although this would not preclude interim legislation pending ratification of the amendment. We do not say that the amendment must follow the Washington consensus.²

There are other worthy proposals which merit your thoughtful consideration. We do think this consensus, which is now supported by the American Bar Association and a considerable body of the most knowledgeable scholars in the field, contains provisions which are sound and reasonable, and consistent with the basic framework of our Government.

We respectfully commend these proposals to this subcommittee with the hope that they will assist you and the Congress in initiating at this session an appropriate constitutional amendment.

Senator BAYH. Thank you very much, both of you, for your concise statements on the overall problem and your detailed discussion of the consensus report.

I would also like to thank both of you and, through you, the members of the American Bar Association, for the time and effort that you have expended over the past several weeks on this problem. I would like to thank the witnesses for the initiative that the American Bar Association has taken in its efforts to reach a consensus and convening this consensus group. I think that this is typical of the traditions of the American Bar Association and its spirit of public service.

I would also like to thank you for the consideration which was given the consensus subsequently by the house of delegates at your national meeting in Chicago. This shows that you not only are willing to talk about it, but that you are willing to put the great influence of the American Bar Association behind this effort.

I would like to echo the words of our second witness to the extent that this problem is not going to be solved at all unless we can get a meeting of the minds of the Members of Congress as well as the public in general. When we have so many different ideas varying in approach but with the same goal in mind, it is difficult to do.

I hope that those of us who are studying this problem will realize the great effort that you have made within your organization to reach a meeting of the minds. Although I am certain that at the start there was as much disagreement in your group as there is probably in the subcommittee, the full committee, and in the Congress, still you put any personal pride of authorship secondary to the need to reach a consensus or a plan which could be accepted by the group.

You pointed out, I thought very well, the importance of this problem. To further exemplify the importance of this problem the Legislative Reference Service of the Library of Congress has provided us with a rather detailed list of the 16 times in which the office of Vice President has been vacant, the names of the Vice Presidents, and the time of the vacancies.

If there is no objection, I would like to put this in the record at this time.

(The material referred to follows:)

² It is to be noted that the proposals in the consensus are not expressed in the definitive form of a constitutional amendment. Rather, they are intended primarily as statements of the substance of the principles involved.

Instances when the United States has been without a Vice President

Vice President	Termination of office	Term for which elected	Length of time office vacant	President
George Clinton.....	Died Apr. 20, 1812.....	Mar. 4, 1809-Mar. 3, 1813	Apr. 20, 1812-Mar. 3, 1813	James Madison.
Elbridge Gerry.....	Died Nov. 23, 1814.....	Mar. 4, 1813-Mar. 3, 1817	Nov. 23, 1814-Mar. 3, 1817	Do.
John C. Calhoun.....	Resigned Dec. 28, 1832, to take seat in Senate...	Mar. 4, 1829-Mar. 3, 1833	Dec. 28, 1832-Mar. 3, 1833	Andrew Jackson.
John Tyler.....	Took oath of office as President, Apr. 6, 1841....	Mar. 4, 1841-Mar. 3, 1845	Apr. 6, 1841-Mar. 3, 1845	William H. Harrison, died Apr. 4, 1841.
Millard Fillmore.....	Took oath of office as President, July 10, 1850....	Mar. 5, 1849-Mar. 3, 1853	July 10, 1850-Mar. 3, 1853	Zachary Taylor, died July 9, 1850.
William R. King.....	Died Apr. 18, 1853.....	Mar. 4, 1853-Mar. 3, 1857	Apr. 18, 1853-Mar. 3, 1857	Franklin Pierce.
Andrew Johnson.....	Took oath of office as President, Apr. 15, 1865....	Mar. 4, 1865-Mar. 3, 1869	Apr. 15, 1865-Mar. 3, 1869	Abraham Lincoln, died Apr. 15, 1865.
Henry Wilson.....	Died Nov. 22, 1875.....	Mar. 4, 1873-Mar. 3, 1877	Nov. 22, 1875-Mar. 3, 1877	Ulysses S. Grant.
Chester A. Arthur.....	Took oath of office as President, Sept. 20, 1881....	Mar. 4, 1881-Mar. 3, 1885	Sept. 20, 1881-Mar. 3, 1885	James A. Garfield, died Sept. 19, 1881.
Thomas A. Hendricks..	Died Nov. 25, 1885.....	Mar. 4, 1885-Mar. 3, 1889	Nov. 25, 1885-Mar. 3, 1889	Grover Cleveland.
Garret A. Hobart.....	Died Nov. 21, 1899.....	Mar. 4, 1897-Mar. 3, 1901	Nov. 21, 1899-Mar. 3, 1901	William McKinley.
Theodore Roosevelt....	Took oath of office as President, Sept. 14, 1901..	Mar. 4, 1901-Mar. 3, 1905	Sept. 14, 1901-Mar. 3, 1905	William McKinley, died Sept. 14, 1901.
James S. Sherman.....	Died Oct. 30, 1912.....	Mar. 4, 1909-Mar. 3, 1913	Oct. 30, 1912-Mar. 3, 1913	William H. Taft.
Calvin Coolidge.....	Took oath of office as President, Aug. 3, 1923....	Mar. 4, 1921-Mar. 3, 1925	Aug. 3, 1923-Mar. 3, 1925	Warren G. Harding, died Aug. 2, 1923.
Harry S. Truman.....	Took oath of office as President, Apr. 12, 1945....	Jan. 20, 1945-Jan. 20, 1949	Apr. 12, 1945-Jan. 20, 1949	Franklin D. Roosevelt, died Apr. 12, 1945.

Sources: Congressional Directory, 83d Cong., 2d sess., February 1954, p. 299. Biographical Directory of the American Congress, 1774-1949, Washington 1950.

Prepared by Norman D. Burch, History and General Research Division, Oct. 26, 1954

**STATEMENT OF HON. MARION B. FOLSOM, CHAIRMAN, COMMITTEE
FOR IMPROVEMENT OF MANAGEMENT IN GOVERNMENT, COM-
MITTEE FOR ECONOMIC DEVELOPMENT**

Mr. FOLSOM. Mr. Chairman and members of the Senate Judiciary Subcommittee on Constitutional Amendments, your invitation to testify on the vital subject of a constitutional amendment designed to solve the problem of presidential succession and inability is much appreciated, both by me personally and—I am certain—by my fellow trustees of the Committee for Economic Development, and by all members of the CED's Committee for Improvement of Management in Government.

This is the first occasion, so far as I recall, on which any representative of CED has appeared before this subcommittee of the Senate. Perhaps it is appropriate at this time to outline briefly CED's interests, activities, and composition.

The Committee for Economic Development was established in 1942. It has been actively engaged over the intervening years in the development of national policy positions best suited to encourage the economic well-being of the United States and of the free world. Policy statements on such matters as taxation, Federal expenditures, foreign trade, and monetary management have been issued frequently and distributed widely. Many of these have received a favorable reception, on their merits, in the business community, in university faculties, and in other influential circles, leading eventually to broad public acceptance of their basic principles.

The Committee for Economic Development consists of 200 trustees representing a broad spectrum of business and university leadership in the United States. Its several subcommittees are supported in their work by advisory groups of the best scholarly minds in the Nation.

About 2 years ago, several top officials of the Kennedy administration and former officials of the Federal Government approached me and others active in CED, proposing that we apply the same approaches to improvement of our governmental institutions that have been used in formulating national economic policies in the public interest. With financial support from Carnegie Corp. and several other foundations, CED has established the Committee for Improvement of Management in Government. The 25 CED trustees with most experience in Government were appointed to it, and 10 additional members were added from outside CED to provide the broadest possible balance for our work.

Four of our thirty-five members had served as heads of Cabinet Departments, five had been Assistant or Under Secretaries, thirteen chairmen or members of Federal regulatory or advisory commissions, and thirteen were former bureau chiefs or directors, or special assistants to the President or to Cabinet members.

You might say one was a former Senator, Senator Benton.

Our committee's work has benefited greatly from the counsel of our advisory board, men with wide experience in governmental affairs, as well as in university and business circles. These 15 advisers are listed on page 6 of the document I think you have before you.

The Committee for Improvement of Management in Government regards the subject of Presidential succession and inability as one commanding highest priority. We recognize and commend the constructive work done by you, Mr. Chairman, and your colleagues of the

Senate Judiciary Subcommittee on Constitutional Amendments, in drafting and gaining Senate approval for a constitutional amendment which—if finally adopted—would do much to correct serious deficiencies in our present constitutional system. The thought and effort devoted to these problems are a great service to the Nation.

The second policy statement issued by our committee deals with these matters in some depth, and I am pleased to submit copies of that statement for your examination. Our committee has deliberated at length on every facet of this complex series of issues, in consultation with our advisers.

We have also had the benefit of Mr. Brownell's Committee of the American Bar Association. They met with us and his staff met with us extensively in our discussions.

Both the Committee for Improvement of Management in Government and the CED Research and Policy Committee have approved the policy positions set forth in this document. Of some 60 members of these 2 committees, only 2 have expressed reservations and 1 has dissented, in footnotes contained in the document. The members of the two committees are listed on pages 5 and 6 of the policy statement.

I emphasize the strength of our consensus because there are some distinct differences between positions taken by CED and the provisions of the proposed constitutional amendment as it was approved by the Senate in its last session.

We do agree, wholeheartedly, that any vacancy in the Office of Vice President should be promptly filled, through nomination by the President and with congressional confirmation.

We also concur, of course, on authority for the Vice President to act as President in situations where both President and Vice President are in agreement on the need.

We regard clarification of other situations, involving presidential inability, as an immediate imperative—as Members of the Senate do, also—but we believe that certain modifications of the proposal, as approved by the Senate last year, would prevent possible ambiguity and confusion in future situations that might conceivably arise. It may be well to identify, in quite specific terms, the points at which we depart in any substantial way from the previous thinking of this committee.

First, we believe that congressional confirmation of a Presidential nomination to fill a vacancy in the Vice-Presidency should be through a joint session of the two Houses, requiring approval by a majority of all Senators and Representatives present and voting.

I understand that was along the line that the Senator from Iowa was just suggesting in his amendment—a joint session.

We favor this method, as opposed either to confirmation by the Senate alone, or to approval by the two Houses acting separately, for three primary reasons: (1) The joint session corresponds to voting strength, State by State, in the electoral college; (2) action—pro or con—would be more expeditious than could be expected through separate consideration by the two Houses or under normal Senate procedures; and (3) the Senate and the House of Representatives might be in disagreement, with unfortunate effects. We acknowledge that formal action in joint session would require establishment of rules of procedure for that body but this would seem to be a relatively simple problem.

Second, we believe that the initiative in determination of an undeclared presidential inability should lie with the Cabinet and not with the Vice President. In other words, we feel that such determination should be by the Cabinet, the Vice President concurring, as was provided in the amendment as passed by the Senate last year. Our reasoning rests upon repeated experience; for example, during the Garfield and Wilson illnesses, showing that the Vice President is likely to be most reluctant to proclaim the Nation's need for him to assume the presidential powers and duties, no matter how urgent or obvious the necessity, so long as the President lives.

The Vice President should never be forced to accept authority under conditions permitting unfair charges of usurpation against him, nor should his natural feelings of deference and loyalty to a disabled Chief Executive be allowed to absolve him from his proper responsibility. The Committee for Improvement of Management in Government has taken a strong position on this point, perhaps because four of us were members of the Cabinet during one or more of President Eisenhower's several periods of illness.

If Members of the Congress were to visualize clearly the realities in cases of this kind, we believe they would conclude, as we have, that initiative should rest with the Cabinet, and not with the Vice President. Further, we oppose creation of any alternative group as a substitute for the Cabinet in determination of presidential inability, on grounds fully explored in our policy statement. The Cabinet is best situated, through the intimate knowledge its members have of major issues of state and by reason of their day-to-day association with the President, both to judge presidential inability and to assess the urgencies in the national situation at any moment.

Third, we are much concerned that the Nation avoid any possibility of doubt, dispute, or delay concerning termination of any conceivable presidential inability. That is why we urge that this matter also be decided by the Cabinet, subject only to presidential concurrence. The amendment proposed last year opens—in our view—opportunity for confusion and dispute over who may hold legitimate authority to exercise the powers and duties of the Presidency in some future time of trial and trouble.

The principle of separation of powers among the three branches of government appears to us to be eminently sound. We cannot agree that it is wise to place a conceivable future difference of opinion between President and Vice President over the termination of a presidential inability before the Congress for decision, especially if the result is to depend upon two-third majorities in both Houses.

This subject deserves renewed attention and closest scrutiny. Under the language previously proposed, it would be possible for a President to terminate his own disability, against the judgment of the Vice President supported by the entire Cabinet and a unanimous vote of the Senate, if only one-third of the House of Representatives were to agree with the President. We may hope that no such disagreement would ever occur but some better arrangement than this should be made for the possibility, however remote it may now seem to be. We strongly reaffirm the merits of Cabinet decision on this delicate matter, subject only to presidential concurrence.

Finally, although corrective action would not require a constitutional amendment, our committee strongly prefers the terms of the

1886 statute on presidential succession, as opposed to those of the 1947 statute. If early provision is made for filling vice-presidential vacancies, the need for revision of the present arrangement would be lessened but it would still exist. The reasons for this position are noted in our policy statement and they bear great weight. One fact alone should be decisive here: For 8 of the past 18 years, the Speaker of the House has been of the political party in opposition to that of the President. Surely, we do not wish to permit a change in the partisan complexion of the executive branch through some accident of death or disability.

In summary, I would emphasize the criteria used by our committee in arriving at its choices among the various possible alternatives. They were: (1) Continuity in the exercise of Presidential powers and duties; (2) legitimacy and public acceptability; (3) certainty, leaving no doubt who—and who alone—may exercise these powers; (4) stability in policy; (5) speed and simplicity in procedures used to determine the issues; and (6) preservation of the separation of powers.

Above all, we hope and trust that the best and wisest remedy may be found for each defect in our present system. The Constitution is not easily amended, nor should it be. The process requires the kind of careful deliberation being given in this case.

I would conclude by quoting a key paragraph in our CED policy statement:

The urgency of national action, to resolve the doubts and uncertainties clouding Presidential succession and inability, cannot be overly stressed. Failure to correct the deficiencies will subject the Nation to risks and hazards that are avoidable. Prompt action is imperative.

In view of the discussions between the Senator from Nebraska and the Attorney General, I would just like to call your attention to one passage from our statement, about the question of bringing Congress into the picture. It begins with the words, "The disadvantage of a Senate-approved arrangement goes too far"——

Senator BAYH. Could you tell me what page it is on?

Mr. FOLSOM. That is on page 31 in the middle of the page. It ends with the sentence:

Given a Congress with a hostile two-thirds majority such as existed during the Presidency of Andrew Johnson, it could be used to deprive the President of his powers and duties, without resorting to the circumscribed impeachment procedures.

In summary, our main concern—I might say that if the committee finds that they get better agreement on your resolution without any change, we certainly feel that you should go ahead and pass the legislation as it is without any changes. But we do feel, as indicated in our statement, that we think it would improve with these three somewhat minor differences. In some ways, it could be very easily changed, but on the other hand, we think they are quite important.

The first is that we think to authorize Congress to decide this dispute really alters the constitutional separation of powers. By providing this to Congress, we think you are apt to get into a period of indecision and confusion where the people would not know who was going to be President. As the Senator from Nebraska indicated, this might last quite awhile.

**STATEMENT OF CLINTON ROSSITER, PROFESSOR OF AMERICAN
INSTITUTIONS, CORNELL UNIVERSITY**

Mr. ROSSITER. Thank you, Senator.

I am honored indeed to appear before this subcommittee and to voice my support of its laudable efforts to provide workable solutions to the persistent problems of Presidential inability and succession.

As you say, I have submitted for the record two statements, one on inability, and the other on succession and the filling of a vacancy in the Vice Presidency and from these I would like, if you will permit me, to extract several points for emphasis.

First, I would like to say in all seriousness that this problem is not a shadow, but a very real problem, indeed. It is, as you say, real in history in the disability particularly of Presidents Garfield and Wilson. It is even more real in the threat of demoralized chaos that it constantly poses.

May I put it this way: Perhaps the most pressing requirement of good Government in the United States today is an uninterrupted, unchallengeable exercise of the full authority of the Presidency. We need a man in the Presidency at all times who is capable of exercising this authority, and we need one, moreover, whose claim to that authority is undoubted. No man should be expected to, no man should be permitted to, wield the power of the Presidency without the clearest of titles to it. And whatever arguments may exist for the great doctrine on which our system of constitutional government is based, that all power must be, first of all, legitimate, apply with a kind of double severity to the power that is lodged in the American Presidency.

My second point is to praise, as an interested citizen, the simple, sensible arrangement worked out by President Eisenhower and Vice President Nixon in 1958, and since reconfirmed by Presidents Kennedy and Johnson.

My third point is to state that we need something more than this arrangement which has been a useful stopgap, but can be pushed just so far, and however compelling a precedent it may be for future Presidents.

At the same time, I think we need something less than one of the grandiose complicated systems presented for our consideration in the past few years and, indeed, before this subcommittee in the past few weeks.

I say something more than the Eisenhower-Nixon or now Johnson-McCormack arrangements, because there are simply too many people of good will, of influence, of decision, who remain in doubt about this question.

I say something less because it would be either feckless or reckless to lay out an elaborate plan to solve a problem that in one sense is not much of a problem at all and in another is quite insoluble.

Next, I would agree with those Congressmen, Senators, and scholars who think that most of what we can reasonably hope to do can be done by a joint or perhaps even a concurrent resolution of Congress in support of the presidential and vice presidential arrangements. Such a resolution could end debate on at least five doubtful issues, and the rest could probably be left to the men of good will and good sense we expect to govern us in the years to come, and these briefly, are the

points that such a resolution could make with conviction principally because they express what has always been the most thoughtful opinion on the matter.

I think we can agree on these things: First, that the President of the United States has the right to declare his own disability, and to bestow his powers and duties upon the Vice President or in the event there is not a Vice President upon the next officer in line of succession.

Two, if the President is unable to declare his own disability, the Vice President is to make this decision on his own initiative and responsibility. I assume all this incidentally in writing.

Third, in the event of disability, the Vice President shall only act as President. His original oath as Vice President shall be sufficient to give full legitimacy to his orders, proclamations, and other official actions in behalf of the disabled President.

Fourth, the President may recover his powers and duties at any time simply by informing the Vice President that his disability no longer exists.

And, finally, disability, to use the words of Professor Silva, means any *de facto* inability, whatever the cause, whatever the duration, if it occurs at a time when the urgency of public business requires executive action.

Now these points, sir, add exactly nothing in my opinion to the situation as it now exists, and as it was so honestly put in the Eisenhower-Nixon agreement.

But, if a resolution of the Congress incorporating them would help clear the air of doubt, let us by all means have it. For the benefit of those who would still have doubts, let us consider declaring these principles in an amendment to the Constitution. However, I would inject the opinion that, I don't know how you feel, but I don't much like constitutional amendments. I don't know if I should say that before this subcommittee because I don't want to put it out of business.

Senator BAYH. That is why you are here; we want it straight from the shoulder.

Mr. ROSSITER. But I think, in general, the less we load up the venerable Constitution with extra words the better off we are.

However, if you think it absolutely necessary, if the peace of mind of the country would be greater, then let us put on top of the executive arrangement a resolution, on top of the resolution a constitutional amendment.

But, sir, my next point, let us be careful to do no more than that. Let us not write a law or amendment that tries to provide for all the eventualities that might arise, let us, like the framers of the Constitution and of the best laws under which we live, not trap our descendents in a snare of technicalities.

In particular, I would advocate, with President Eisenhower, that we think very carefully before we go beyond the President and the Vice President in search of machinery to decide doubtful cases of disability. I think we should consider perhaps bringing Congress into the picture but I hope that we will not construct, if I may call it that, a monstrosity that raises more doubts than those it is supposed to settle.

I owe it to you, sir, in all candor to say that I see almost nothing to give us confidence. Rather a great deal to give us pause in the

various schemes that would bring Congress or the Cabinet or the Court or the Governors of the States or former Presidents into the picture.

A judgment of Presidential disability is in both great senses of the word a political decision, a high determination of policy, and the men who count politically in this country, whether in the Congress or in the Cabinet, are going to have their say, they are going to be consulted, and I think we should leave it to them and to the men who take action with the President or the Vice President to decide how best to hear that said.

Above all, I would be deeply distressed and troubled as a citizen if in any way the Court or the Chief Justice were brought into this picture.

As to this general proposal of a special tribunal, a Presidential disability commission, the notion that it could lay our doubts to rest seems to me quite unsubstantial.

The last thing we would want to do is to provide some method resembling a trial, complete with expert witnesses and cross-examination in the face of the Nation's difficulty. In circumstances that call for action, it would use up too much time. In a crisis that called for unity, it would open up needless wounds.

Another point I would make is we should be careful not to provide a method that would make it too easy for a President to surrender his powers temporarily. We have labored, sir, for generations to preserve the great essence of the Presidency, which is unity, and I would be unhappy to see us open the door even a little way to pluralism in this great office. I do not need to tell you that we are not talking about an ordinary office, the generalship or the headship of a corporation. We are talking about an indisposed President of the United States, the greatest constitutional office the world has ever known, and there is surely a qualitative difference between it and all others in and out of the Government.

I am led by these considerations to repeat my observation that in one sense, perhaps the most important sense, the problem of disability is quite insoluble. We may solve it legally by framing and understanding in law and custom or in the Constitution that leaves no doubt about the terms on which power is to be transferred from a really ailing President to a healthy Vice President, and we could perhaps do away with the practical difficulties we met in 1881 when we had a Vice President who was an outsider, or in 1919 when we had a President who was an authentic giant.

But a period of clearly established Presidential disability in any case is going to be a messy situation, one in which caution, perhaps even timidity, must mark the posture of an Acting President; a period of doubt, a period in which a Roosevelt declines or an Eisenhower recovers will be even messier, and I don't think it is any help at all to ask why a Truman or a Nixon should not take over in such a situation.

My answer, sir, is that he cannot. That the Presidency is an office governed by almost none of the ordinary rules, that a wise custom of the American people command us at all reasonable costs to guard the unity of the Presidency and of the dignity of the man who holds it.

Now, sir, may I say a few words on the problem of succession?

On this problem I am aware of the reluctance now felt in the Congress to amend the act of 1947, and to return to the rather more simple solution of the act of 1886, by placing the succession in the Cabinet.

Nevertheless, I am bound to say in my opinion that the act of 1947 is a poor one, in many ways one of the poorest ever to emerge from this stately and distinguished body. I am not even sure, Senator, that it is a constitutional act, and sooner or later it will have to be amended, if not scrapped.

In the meantime, I am willing to settle for less. In particular, I would agree with the carefully worked out views of yourself, at least part of the views of the American Bar Association conference on Presidential inability and succession, and with those expressed in the letter from former President Eisenhower.

In particular, I think that we should go against this problem today and solve it, except in the most ghastly and unforeseen of circumstances, by providing a dignified, open and conclusive means of filling the Vice Presidency whenever it has been vacated.

If we could be sure that there would always be or almost always be a Vice President then perhaps we would not need to worry our heads too much over the really quite unanswerable question whether the Secretary of State or the Speaker of the House at any particular time would make a better president or acting president.

With all due respect to my Senator, if I may describe him that way, Senator Keating, I do not think the proposal of a Second Vice President to be elected with the President and Vice President on the same ticket is a happy one.

Not many of our able men, I fear, would be candidates for a position of even less power and promise than the Vice Presidency itself. We have labored long and hard to make the Vice Presidency a distinguished position which our most able politicians seek. I think we would have to start our labors all over again.

With all due respect to my Governor, if I may describe him that way, Governor Rockefeller, I do not see much that gives me confidence in the proposal of a super Secretary standing between the President and his great officers of state with the line of succession vested in him, and if I may say so, sir, I pointed this out in a report to President Eisenhower's Commission on National Goals in 1960. I am sorry to see that Governor Rockefeller has revived this idea.

Several methods have been proposed, as you know, to fill the vacant Vice Presidency. We could have, first of all, some kind of convening in the States or in Washington of the electoral college, especially for that purpose. We could have designation of a Vice President by the President alone. We could have his election by one or both Houses of Congress. We could have, I suppose, a specially called national election because Congress clearly has that power.

Finally, we could have nomination by the President and confirmation by one or both Houses of Congress.

The first of these methods, sir, I think is inadmissible, because the electors are very rarely men of national standing, and the electoral college is simply not designed for this kind of action.

The second method, designation by the President, is inadmissible because no President should be permitted to act entirely on his own in choosing a successor.

The third is equally inadmissible because no Congress should be permitted to shove a successor upon a President against his will and judgment especially if the President's party is in minority in Congress.

The fourth is inadmissible because I think it would be simply too much turmoil and chaos and expense to have a special nationwide election to choose a new Vice President.

It is this final method, sir, which would join the three great political branches of our Government—President, Senate, and House—in a solemn and responsible act which strikes me as much the most sensible and convenient way to handle this delicate and vital problem.

There would be, I think, a clear burden on the President to nominate a man of the highest stature and abilities. There would be a clear burden on the Congress to withhold its approval unless such a man were nominated, and to give its approval if such a man were nominated. Because the President disposes, we could expect the promise of continuity in the executive branch, and because Congress, as it were, disposes, we could assume the fact of legitimacy. We would have once again that doublecheck, that system of checks and balances, that has made our system so great and lasting.

I think we could expect the President and the joint session of Congress to work together in this vital area of the national interest and indeed expect a real display of statesmanship.

Senator, in my opinion, an amendment to the Constitution would be necessary in this instance to fix this particular reform firmly in the American system of government. But I see no reason, political or constitutional, why we should not have Congress enact a temporary law for the time being creating the office of Acting Vice President of the United States, providing for filling it in the manner described above in the event the Vice Presidency is vacated, and designating its occupant, as Congress has a right to do, as first in line of succession, and would recommend to you with all humility this double step, a proposal of an amendment to the Constitution to fill the Vice Presidency when it becomes vacant, on the nomination of the President, and the confirmation of a joint session of Congress and at the same time a, if you wish to call it that, stopgap law.

This, I think, is the surest way to solve the enduring problem of which we have been so dramatically reminded by the tragic death of President Kennedy.

One final point, Senator: I would like to point out to you that there are yet other loopholes in our system. We do not, in fact, know what we would do if we were to lose our elected President, our popularly elected President between, as it is this year, November 3, when we all go to the polls, and December 14, when the electoral colleges meet in the several States to cast their ballots; we do not know what would happen if we were to lose the President between December 14 and then January 6 when you meet with your colleges in House and Senate to open the ballots and to register them, so to speak.

May I remind you, Senator, that in the 20th amendment, the famous Norris, or lame duck amendment, in sections 3 and 4 there is a definite plea for congressional action on this point.

Myself, I think that perhaps—I know you have studied this with great care but if you feel that this is at all possible, it might be a useful thing, that a special commission, a bipartisan commission, a commis-

sion chosen by the President and the leaders of Congress, with Members of the Congress, members of the executive, and citizens in whom we can have confidence, perhaps even a professor or two, for that matter, might well be set up to study and to report on all these problems, on all the obvious loopholes we have in this part of our constitutional system.

I am grateful, Senator, for having been offered this opportunity to express my views, and I welcome any questions you may wish to put to me.

(The statement of Mr. Rossiter follows:)

STATEMENT BY CLINTON ROSSITER

THE PROBLEM OF DISABILITY IN THE PRESIDENCY

The problem of disability is, then, a real problem, real in history and even more real in the threat of demoralized chaos it constantly poses. Perhaps the single most pressing requirement of good Government in the United States today is an uninterrupted exercise of the full authority of the Presidency. We need a man in the Presidency at all times who is capable of exercising this authority; we need one, moreover, whose claim to authority is undoubted. No man should be expected or permitted to wield the power of the Presidency without the clearest of titles to it. Whatever arguments may exist for the grand doctrine of constitutional Government that all power must be first of all legitimate apply twice as severely to the power that is lodged in the American Presidency.

In my opinion, we need something more than this arrangement, however compelling a precedent it may be for future Presidents, and something less than one of the grandiose schemes presented for our consideration in the past few years. I say "something more" because there are simply too many people of influence who remain in doubt about this question, "something less" because it would be either feckless or reckless to lay out an elaborate plan to solve a problem that in one sense is not much of a problem at all and in another is quite insoluble.

I would agree with those Congressmen and scholars who think that most of what we can reasonably hope to do can be done by a joint or even concurrent resolution of Congress.

Such a resolution could end debate on at least five doubtful issues; the rest could properly be left to the men of good will and good sense we expect to govern us in the years to come. And these are the points it could make with conviction, principally because they express what has always been the most thoughtful opinion on the matter:

(1) The President of the United States has the right to declare his own disability and to bestow his powers and duties upon the Vice President or, in the event there is not a Vice President, upon the next officer in line of succession.

(2) If the President is unable to declare his own disability the Vice President is to make this decision on his own initiative and responsibility.

(3) In the event of disability, the Vice President shall only act as President; his original oath as Vice President shall be sufficient to give full legitimacy to his orders, proclamations, and other official actions.

(4) The President may recover his powers and duties simply by informing the Vice President that his disability no longer exists.

(5) Disability, to repeat Professor Silva's words, means "any de facto inability, whatever the cause or duration, if it occurs at a time when the urgency of public business requires Executive action."

These points add exactly nothing, in my opinion, to the situation as it now exists, and as it was so honestly put by President Eisenhower; but if a resolution incorporating them would help clear the air of doubt, let us by all means have it. And for the benefit of those who would still have doubts, let us at the same time move to declare these principles in an amendment to the Constitution.

Let us be careful to do no more than that. Let us not write a law that tries to provide for all the eventualities that might arise, lest we trap our descendants in a snare of technicalities. Let us not go beyond the President and Vice President in search of machinery to decide doubtful cases of disability, lest we construct a monstrosity that raises more doubts than those it is supposed to settle.

As to the proposal of a special tribunal, a Presidential Disability Commission, the notion that it could lay our doubts to rest seems quite unsubstantial. The last thing we should do is to provide a method that resembles a trial, complete with expert witnesses and cross-examination. In circumstances that called for action it would use up too much time; in a crisis that called for unity it would open up needless wounds.

I am led by all these considerations to repeat my observation that in one sense, probably the most important sense, the problem of disability is quite insoluble. We may yet solve it legally by framing an understanding in law and custom that leaves no doubt about the terms on which power is to be transferred from an ailing President to a healthy Vice President; we can even do away with the practical difficulties we have met in the Vice President who is an outsider or the President who is a giant, not to mention the President who is mentally alert but physically confined.

A period of clearly established Presidential disability will always be a messy situation, one in which caution or even timidity must mark the posture of the the acting President.

THE PROBLEM OF SUCCESSION TO THE PRESIDENCY

The problem of succession could best be solved, except in the most ghastly and unforeseen of circumstances, by providing some dignified and conclusive means of filling the Vice-Presidency whenever it has been vacated. If we could be sure that there would always, or almost always, be a Vice President, then we would not need to worry our heads too much over the really quite unanswerable question of whether the Secretary of State or Speaker of the House would make a better President.

The proposal of a second Vice President, to be elected with the President and Vice President on the same ticket, is not a happy one. Not many of our able men, I fear, would be candidates for a position of even less power and promise than the Vice-Presidency itself.

Several methods have been proposed to fill a vacant Vice-Presidency:

- (1) A vote of the electoral college, especially convened for this purpose.
- (2) Designation by the President.
- (3) Election by one or both Houses of Congress.
- (4) Nomination by the President and confirmed by a joint session of Congress.

The first of these methods would be inadmissible because the electors are rarely men of national standing, the second because no President should be permitted to act entirely on his own in choosing a successor, the third because no Congress should be permitted to shove a successor upon a President against his will and judgment—especially if the President's party is in the minority in Congress.

The fourth method, which would join the three great political branches of our Government together in a solemn and responsible act, strikes me as much the most sensible and convenient way to handle this delicate and vital problem. The burden would rest upon the President to nominate a man of the highest stature and abilities, upon the Congress to withhold its approval unless just such a man were nominated. Because the President proposes we could expect the promise of continuity in the executive branch; because Congress disposes we could assume the fact of legitimacy.

An amendment to the Constitution would be necessary to fix this reform firmly in the American system of government, but I see no reason, political or constitutional, why Congress could not enact a temporary law creating the office of "Acting Vice President," providing for filling it in the manner described above in the event the Vice Presidency itself is vacated, and designating its occupant as first in line of succession. This double step, a proposal of an amendment to the Constitution accompanied by a stopgap law, is the surest way, in my opinion, to solve the enduring problem of which we have so dramatically been reminded by the tragic death of President Kennedy.

STATEMENT OF PAUL A. FREUND, PROFESSOR OF LAW, HARVARD UNIVERSITY

Mr. FREUND. Thank you, Mr. Chairman. I am Paul A. Freund, professor of law at Harvard University.

Mr. Chairman, I greatly appreciate the opportunity to respond to the invitation to present my views on the subject of Presidential inability and succession. I had the privilege of participating in the consultations of the American Bar Association group last month, and my views are in substantial accord with the recommendations of that group.

Presidential inability and Presidential succession are two distinct problems, but they are interrelated. In considering both of them, our aim should be threefold: to assure prompt action when required in an emergency; to avoid an abrupt shift in administration policy; and to provide safeguards against intrigue or other extraneous motivations.

I would suggest that in considering any of the proposals before the committee, these three criteria be used to judge them.

Presidential inability is, to be sure, a delicate and distasteful subject to contemplate but in all prudence it must be faced. The Constitution leaves the subject in a state of uncertainty in two crucial aspects: What is the status and tenure of the officer who serves during the disability of the President, and how is the disability to be determined in its onset and its termination? Article II juxtaposes death, resignation, removal, and inability as occasions for a vacancy in the office of President. Although the historic evidence seems to have pointed the other way, consistent practice since the accession of John Tyler has established that upon the death of the President, the Vice President succeeds to the office and title for the unexpired term, and not simply to the exercise of the powers and duties of the office.

There can hardly be disagreement that this was a wise interpretation, but it poses a problem in the case of mere inability of a living President. President Truman, for example, has expressed himself as believing that the Vice President or other office next in line of succession succeeds to the office itself for the remainder of the term even in the case of the President's inability. So long as this uncertainty persists it ought to be resolved in the most authoritative way, through a constitutional amendment. To treat temporary inability in the same way as death for purposes of succession would, it seems clear, cause great reluctance on all sides to transfer the responsibilities of the office where the inability appears to be curable within the term. Such an inhibition on placing the responsibilities of the office in active, responsible hands would be highly unfortunate in the periods of crisis which have become more and more the staple of our national life.

The first requisite, therefore, is a provision by way of constitutional amendment to differentiate the position of one who succeeds to the office on the death of the President from that of one who assumes the powers and duties of the office during the President's inability.

The next question obviously concerns the determination of inability. Does a provision on this subject require a constitutional amendment, or might it be effected through ordinary legislation? To this question the answer is unclear. If we were concerned simply with the inability of a President who had himself succeeded to the office through the death of the former President, leaving no Vice President, so that the line of succession next to be invoked would be that prescribed by the act of Congress, a good case could be made that Congress could provide the procedure for determining inability, as an adjunct to its constitutional power to provide the line of succession after the Vice President. But the problem is broader than this and extends to the case where the President may be disabled while a Vice President is in office.

In favor of a congressional power to deal with this case of inability, the necessary-and-proper clause might be invoked; that is, arguably Congress could legislate to enable the President and Vice President more effectively to discharge their powers and duties with regard to the filling of the office. But against this construction there is the strong countervailing principle of separation of powers, particularly as it affects the two highest Executive offices. The power to determine disability is vested in the President and Vice President by implication, just as the power of removal of high executive officers is vested in the President by implication from his power of appointment. When Congress undertook to require the President to submit removals to the Senate for its approval, in the case of officers for whose appointment their approval had been required, the Supreme Court in a celebrated decision declared the law to be an unconstitutional intrusion on the province of the Executive (*Myers v. U.S.*, 272 U.S. 52 (1926)). Even apart from the serious constitutional doubt concerning the authority of Congress in this sphere, it seems appropriate that so fundamental a matter as a transfer of powers in the highest Executive Office should be dealt with in our fundamental law.

The President, of course, has the primary responsibility for determining his own disability. But occasions may arise when he is not in a position to make such a declaration or even to recognize its necessity. In that case the responsibility would fall on the Vice President; but that officer should be spared the task of shouldering the responsibility alone. Leaving aside actual self-interest, the very appearance of self-interest might impel him to refrain from a decision which by objective standards ought to be taken. An advisory body to share the responsibility should be designated, and the heads of the executive departments would seem to be the most appropriate existing group for the purpose. A constitutional amendment should so provide.

There is much to be said, as an alternative, for a special Presidential Disability Commission, which would be appointed by the President at the beginning of his term and which would undoubtedly include very distinguished citizens, among them perhaps former Presidents, certain members of the Cabinet, representatives from the Congress, and possibly a medical expert. It would be rather awkward to provide for such a commission in the Constitution—that is to say, in any detail—but authority should be given to Congress to provide through

regular legislation for the appointment by the President of such a body. In this way the constitutional amendment would first fill the void by specifying the heads of the executive departments; and, second, would introduce a measure of flexibility by empowering Congress—with the approval of the President through the lawmaking process—to set out in detail a plan for a different and more specialized body. The Commission would have the advantage of being a disinterested group, designated by the President himself, and prepared to take action without any hint of extraneous motivations.

A contingency might conceivably arise when the President would disagree with the Vice President and a majority of the heads of departments or of the alternate body. In that unhappy eventuality the office ought not to be at the hazard of an incapable President, and he would be relieved of his powers and duties upon the action of the factfinding group. But such a controversy ought not to be left unresolved. It could be dealt with when the President declares the termination of his disability. If the Vice President and the fact-finding body concur with the President, the matter is ended. If there is disagreement, the question should be placed before the Congress. For this purpose it seems advisable that the Congress meet in joint session, and that a two-thirds vote of all the elected Members be required to resolve the difference against the President. This procedure would be taken by analogy to the process of impeachment. Meanwhile, it should be noted, the office itself would not left unfilled or filled by one whose capacity was in serious doubt, since the Vice President would continue to serve until the final action of Congress was taken.

I turn now to the question of the succession to the Presidency. It hardly needs to be said that this problem cannot be profitably considered by envisaging the personal qualifications of individuals who may hold various offices, whether as Speaker of the House, President pro tempore of the Senate, Secretary of State, or whatever, in the unforeseeable future for which we must necessarily provide. The problem is a structural, an institutional one.

The key to the assurance of continuity of administration policy and the avoidance of extraneous considerations in deciding whether to make a transfer of power lines, in my judgment, is keeping the Office of Vice President filled at all times. This is important in itself, given the increased usefulness of the office in recent years, and for the sake of orderly transition, whether temporary or for the remainder of the term.

Of the several methods which have been suggested for the selection of an interim Vice President, the most satisfactory, in my judgment, would be election by Congress with the approval of the President. This could be done by the President's submission of one or more nominees to the Congress. The Vice Presidency should have a popular base and at the same time be in harmony with the Presidency. These objectives can best be achieved by associating the Congress and the President in the selection, with the opportunity for informal consultation to be expected in such a process.

Senator BAYH. Thank you very much, sir. That was certainly a very concise statement.

If I might hastily ask a question or two, keeping one eye on the clock——

Mr. FREUND. Do not bother about that, Senator; I can make my arrangements.

Senator BAYH. We have a police escort waiting, if that will make it a little easier to get there on time.

Do you see some possibility of conflict of interest as far as the judgment of the Cabinet? This is a question which has been raised previously and which Professor Burns raised appropriately. Do you feel that there would be other circumstances which would cause the Cabinet, because of its familiarity with the President and the job he is doing, or for other reasons, to avoid making a decision?

Mr. FREUND. Of course, in all of these alternative proposals, one is trying to steer a course between two polar risks: One, that the body will be motivated aggressively by self-interest, and the other that the body will be too passive, too negative, in order to avoid the appearance of self-interest. I think that the role of the Cabinet as the factfinding body is closely tied in with the question of succession. This is one of the respects in which, as I noted at the beginning of my statement, the two problems—that of determining disability, and that of succession—are interrelated.

Now, Professor Burns, as I understand it, envisages or advocates a return to succession through the Cabinet. I could well understand that if that is to be the line of succession, particularly if the Vice-Presidency is not to be filled, then one might hesitate to make the Cabinet the factfinding or advisory body on disability.

My suggestion, however, and that of the bar association, is that the problem of succession be circumvented for practical purposes by keeping the Office of Vice President filled and thus the Secretary of State would have a highly remote interest in the office.

Senator BAYH. Do you feel that the timidity that has been expressed in the past by Vice Presidents to assume this role is related to at least some extent to the standby procedure he has followed in the past?

Mr. FREUND. I do, decidedly. I think that a solemn constitutional responsibility, spelled out in our fundamental law, would impel the Vice President and the heads of departments to act on the matter objectively, more so than they would if the arrangement were a purely informal extraconstitutional one, as it has been in the past.

Senator BAYH. Senator Keating may have a question or two to pose to you. I am most anxious that you be able to catch that plane.

Senator KEATING. I do not believe I have. I was necessarily called away. I know Professor Freund's point of view. I can only say that my chief reason for differing with him is very largely a practical one.

Senator BAYH. I have not discussed the professor's thoughts on our mutual concern about the State legislatures.

Senator KEATING. I would be happy to hear you say how you are going to successfully get through all the State legislatures anything more than a simple authority to the Congress to act.

Mr. FREUND. Well, Senator, I wonder if this question of specificity versus generality does not cut both ways so far as popular acceptance is concerned. That is to say, I should find it rather embarrassing, myself, to go before State legislatures with something in the nature of a blank check to the Congress. Legislatures might suggest all sorts of possible and, to them, horrendous mechanisms which will pass the Congress and which might even get the approval of the President, which might even get the reluctant approval of the President, because something is needed and we do not have anything.

Now, it seems to me the merit of the bar association proposal is that it tries to make the best of both worlds; that is to say, it sets up a specific and what seems to me a reasonable and appealing procedure, but at the same time leaves it to Congress through the lawmaking process to set up a different mechanism if a better one is seen and approved. But meanwhile, the void is filled.

I, myself, see a good deal of merit in the inability commission idea, particularly if the commission is appointed by the President at the beginning of his term. Yet such a commission could be spelled out very awkwardly at best in the constitutional document. I think that is the kind of thing to leave to Congress. But if you simply gave Congress a general power, would not the State legislatures say, "Well, suppose Congress will take the power on itself to decide when the President is disabled. Are we really voting for that?" Or they might say, "Why has not Congress acted in the past? Is it so clear that they do not have this power?"

In short, I am as troubled by the skeletonized version so far as the State legislatures are concerned, as you are, Senator, by this, as I would see it, middle-of-the-road version, which is both specific and flexible.

Senator KEATING. Well, I have no doubt that some of those views would be voiced in some of the State legislatures. But we have considerable precedent in the income tax amendment and in the prohibition amendment, where Congress was just about given blank check power to legislate; that is, there is some precedent for it. It would be my political judgment that there would be less likelihood of full-fledged debate and defeat in State legislatures for a simple authority to the Congress to legislate than there would be in such a long and not particularly involved, but somewhat involved proposal such as is embodied in Senate Joint Resolution 139, which I would assume—I have not researched this, but I would assume if anything of that kind was made a constitutional amendment, it would be the longest one in history. You are more of a student of the Constitution than some of the members of this committee, but I do not offhand think of any constitutional amendment which is as involved as this one.

Mr. FREUND. Well, for one thing, Senator, this would deal with two topics—disability and succession—which could be in the form of two amendments. Furthermore, the Presidency has been a very complicated textual part of the Constitution, as you know. The 12th amendment is quite complex.

Senator KEATING. Well, I respect your viewpoint.

**The Proposed Twenty-Fifth
Amendment to the
Constitution**

By

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THE PROPOSED TWENTY-FIFTH AMENDMENT TO THE CONSTITUTION

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THE Constitution of the United States does not contain any procedure for dealing with a case of either presidential inability or vice-presidential vacancy. Between 1789 and 1965, several Presidents of the United States have become disabled in office, and the Vice-Presidency has been vacant on sixteen different occasions totaling more than thirty-seven years.¹ Within the last twenty-one years, President Franklin D. Roosevelt suffered a fatal stroke, President Harry S. Truman was the object of an attempted assassination, President Dwight D. Eisenhower suffered a heart attack from which he recovered, and President John F. Kennedy was assassinated. The Vice-Presidency was vacant for approximately twenty per cent of this period. These situations pointed up the glaring defects in our system of presidential succession. After years of unsuccessful attempts to agree on a proposed solution to the problems of presidential inability and vice-presidential vacancy, the United States Congress was finally jolted into action by the assassination of President Kennedy. On Tuesday, July 6, 1965, Congress proposed the Twenty-Fifth Amendment to the Constitution, designed to solve these problems once and for all.

The proposed amendment, which is now under consideration by the state legislatures, provides:

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Sec. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Sec. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no

* Member of the New York Bar; member, American Bar Association Conference on Presidential Inability and Succession.

1. See generally Feerick, *The Vice-Presidency and the Problems of Presidential Succession and Inability*, 32 *Fordham L. Rev.* 457, 459 & nn.6-8 (1964).

inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.²

The purpose of this article is to relate briefly the history behind the proposed amendment, to describe its legislative development, and to analyze its provisions.³

I. HISTORICAL DEVELOPMENT

A. *Presidential Inability*

There was little discussion at the Constitutional Convention of 1787 regarding presidential succession. The only reference to the matter of presidential inability was the unanswered question of John Dickinson of Delaware: "What is the extent of the term 'disability' & who is to be the judge of it?"⁴ As adopted, the Constitution provided in article II, section 1, clause 6:

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

When President William Henry Harrison died on April 4, 1841, a great deal of attention was focused on this provision. There was some difference of opinion as to the meaning of the clause. Vice-President John Tyler asserted his right to the office and title of President for the remainder of Harrison's term. This unprecedented action was not without opposition. Several political leaders and newspapers argued that the Constitution

2. H.R. Rep. No. 564, 89th Cong., 1st Sess. 1-2 (1965).

3. This subject is treated extensively by the author in his book, *From Failing Hands: The Story of Presidential Succession* (1965) [hereinafter cited as *From Failing Hands*], and in his articles, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 *Fordham L. Rev.* 73 (1963); *The Vice-Presidency and the Problems of Presidential Succession and Inability*, 32 *Fordham L. Rev.* 457 (1964); *Presidential Inability: The Problem and a Solution*, 50 *A.B.A.J.* 321 (1964).

4. *The Records of the Federal Convention of 1787*, at 427 (Farrand ed. 1937).

intended for him to remain Vice-President and discharge the powers and duties of President. They said that the words "the Same," in article II, section 1, clause 6, had reference to the powers and duties of the office and not the office itself.⁵ John Quincy Adams stated at the time:

I paid a visit this morning to Mr. Tyler, who styles himself President of the United States, and not Vice-President acting as President, which would be the correct style. But it is a construction in direct violation both of the grammar and context of the Constitution, which confers upon the Vice-President, on the decease of the President, not the office, but the powers and duties of the said office.⁶

When Congress assembled in special session in May 1841, disagreements were voiced over Tyler's status.⁷ Congress, however, acquiesced in his claim to the Presidency, and the precedent was set. It was followed, in turn, by Vice-Presidents Millard Fillmore, Andrew Johnson, Chester A. Arthur, Theodore Roosevelt, Calvin Coolidge, Harry S. Truman, and Lyndon B. Johnson.⁸

On July 2, 1881, when the Nation was confronted with its first case of presidential inability, the Tyler precedent became a formidable obstacle to the Vice-President's acting as President. On that day President James A. Garfield was shot by an assassin, and for the next eighty days he wavered between life and death. Although it appeared at times that he would recover, he had frequent relapses and suffered periods of hallucinations. Toward the end of this period, he saw a few members of his Cabinet, but not once did he see Vice-President Chester A. Arthur. President Garfield's only official act during the eighty days was the signing of an extradition paper. The members of the Cabinet tried to keep the wheels of government turning, but there was much they could not do. Important matters such as the prosecution of post office swindlers and the handling of foreign affairs were neglected.

During the Garfield inability, scholars and politicians discussed the procedure to be followed in a case of presidential inability. Many contended that, if Vice-President Arthur undertook to discharge the powers and duties of President, he would become President for the remainder of the term whether or not Garfield recovered, since the Constitution provided the same result for inability as for death. Garfield's Cabinet

5. From *Failing Hands* 94-95.

6. 10 *Memoirs of John Quincy Adams* 463-64 (C. Adams ed. 1876).

7. From *Failing Hands* 95-96.

8. It is interesting to note that, shortly after Lyndon B. Johnson became President, Leonard C. Jones, a New Mexico attorney, unsuccessfully requested Attorney General Robert F. Kennedy and the United States Attorney for the District of Columbia to institute a suit to try President Johnson's right to the office. In June 1964, Jones instituted his own suit in the United States District Court for the District of Columbia, seeking an ultimate determination that Johnson's becoming President was unlawful, illegal and unauthorized by the Constitution. The suit was dismissed in September 1964.

discussed the matter and unanimously agreed that an Acting President was necessary. It divided four to three, however, on the question of the Vice-President's status if he assumed the President's duties. A majority, which included Attorney General Wayne MacVeagh, felt that, if Arthur acted, he would become President, as did Tyler, for the remainder of the term. The debate came to a close on September 19, 1881, when Garfield died and Arthur became President.⁹

Twelve years later, another President of the United States suffered an inability. On the night of June 30, 1893, President Grover Cleveland boarded a yacht in New York City and for the next five days cruised in Long Island Sound. Unknown to the public and to practically every member of the Government, including Vice-President Adlai Stevenson, was the fact that during that cruise President Cleveland was operated on for the removal of a cancerous growth on the roof of his mouth. Cleveland left the yacht on July 5 at his summer home where he convalesced until July 17, when he again boarded the yacht for a second operation to remove suspicious tissue which had been observed after the first operation.

Aside from an article appearing in the *Philadelphia Press* on August 29, 1893, there was no public reference to the operations. The article was condemned as a hoax and the substance thereof was refuted by the doctors and members of the Government. It was not until the publication of an article in the *Saturday Evening Post* in 1917 by one of the doctors involved in the operation that the public became aware of this inability.¹⁰ According to the doctor, the operation had been performed under complete secrecy because a financial panic existed in the country, and it was believed that, if the public were informed, a greater crisis would result.¹¹

This concealed inability was followed by another case of presidential inability. On September 6, 1901, President William McKinley was shot. The same day, he was operated upon while under the influence of ether. During the ensuing week, he remained confined to bed unable to perform his presidential duties. At first his condition seemed to improve, but after a few days it began to deteriorate, and on September 14, 1901, at 2:00 A.M., President McKinley died.

The next case of presidential inability became the most notorious in our history.¹² On September 25, 1919, President Woodrow Wilson, while on a speaking tour of the United States to gain support for the League of Nations, fell ill. His condition grew worse and, on the following day,

9. See generally *From Failing Hands* 117-39.

10. Keen, *The Surgical Operations on President Cleveland in 1893*, *Saturday Evening Post*, Sept. 22, 1917, p. 24.

11. *Ibid.* See generally *From Failing Hands* 147-51.

12. See *id.* at 162-80. See generally Smith, *When the Cheering Stopped* 89-261 (1964).

the tour was cancelled, and the presidential train was ordered to return to Washington. The public was informed that Wilson had suffered a complete nervous breakdown. On October 2, 1919, President Wilson suffered a stroke which paralyzed the left side of his body.

From September 25, 1919, until the inauguration of President Warren G. Harding on March 4, 1921, the United States was without the services of an able President. For more than six months after the occurrence of the stroke, very few persons had any contact with the President. The medical bulletins regarding his health merely said that he was suffering from nervous exhaustion. As a result, rumors about his condition were circulated. Some supposedly authoritative sources stated that he had had an abscess of the brain; others, that he had suffered a cerebral hemorrhage; and still others, that he had gone mad.

The facts of the inability were concealed not only from the public, but also from the members of the Cabinet. Vice-President Thomas R. Marshall was dependent for his information on the newspapers and the grapevine. He resented being kept in the dark and remarked that it would be a tragedy for the people if he had to act as President under such circumstances.¹³ Edith Bolling Wilson, the President's wife, and Dr. Cary Grayson, his physician, were practically alone in their knowledge of the truth.

In an effort to keep the executive branch functioning, the Cabinet met over twenty times under the direction of Secretary of State Robert Lansing. For this initiative, Wilson dismissed Lansing in February 1920, on the ground that he had assumed presidential authority. Despite its efforts, there were many matters which the Cabinet could not handle. It could not sign bills into law, or make presidential appointments, or answer important letters sent to Wilson. Nor could it agree to amendments to the Charter of the League of Nations which would enable the United States to gain entry. As a result of the absence of presidential leadership by Wilson or a legitimate Acting President, United States participation in the League of Nations was defeated in the Senate, numerous governmental vacancies went unfilled, twenty-eight bills became law by default of any action by the President, foreign diplomats were unable to submit their credentials to the President as required, and, in many other respects, the operation of government was suspended. Anyone who wished to communicate with the President had to do so through Mrs. Wilson. She decided what matters were important enough to be brought to his attention.¹⁴

13. 2 Houston, *Eight Years With Wilson's Cabinet* 37 (1926).

14. Mrs. Wilson stated: "Woodrow Wilson was first my beloved husband whose life I was trying to save, fighting with my back to the wall—after that he was the President of the United States." E. Wilson, *My Memoir* 290 (1939).

On September 24, 1955, thirty-six years after the Wilson inability, President Dwight D. Eisenhower suffered a heart attack. During the next few months, a small group consisting mainly of members of the Cabinet and the White House Staff carried on the affairs of government while the President convalesced.¹⁵ On two other occasions during the Eisenhower administration, the President suffered disabilities (an attack of ileitis and a speech impairment). In "each of these . . . instances," said Eisenhower, "there was some gap that could have been significant in which I was a disabled individual—from the standpoint of carrying out the emergency duties pertaining to the office—I was fortunate that no crisis arose."¹⁶

The tragic death of President Kennedy on November 22, 1963, revived the question of presidential inability.

B. *Vice-Presidential Vacancy*

The Vice-Presidency was created in the closing days of the Constitutional Convention of 1787 and appears to have been an afterthought of the framers.¹⁷ What discussion occurred centered on the Vice-President's position as President of the Senate. Some of the delegates argued that the office, in combining the functions of succeeding to the Presidency and presiding over the Senate, would violate the principle of separation of powers. Others felt that, unless the Vice-President were President of the Senate, he would be without a job and that, if he were not President of the Senate, some member of the Senate, by being made President, would be deprived of his vote, except in cases of ties. There were those who thought the office unnecessary altogether.¹⁸ The office was created by a vote of eight states to two.

The Constitution gave the Vice-President only two duties: (1) to preside over the Senate, in which capacity he could cast tie-breaking votes and open the certificates listing the votes of the presidential electors,¹⁹ and (2) to discharge the powers and duties of the President in case of death, resignation, removal or inability.²⁰ His office was unique, combining legislative and executive functions.

The Vice-President, like the President, was to hold office for four years.²¹ He was to be elected at the same time and in the same manner as

15. See *From Failing Hands* 217-22; Eisenhower, *The White House Years: Mandate for Change 1953-1956*, at 535-46 (1963).

16. Address by General Eisenhower, American Bar Association National Forum on Presidential Inability, May 25, 1964, in 50 A.B.A.J. 638, 640 (1964) (partial text).

17. See 2 *The Records of the Federal Convention of 1787*, at 535-37 (Farrand ed. 1911).

18. See *From Failing Hands* 51-56.

19. U.S. Const. art. I, § 3.

20. U.S. Const. art. II, § 1.

21. *Ibid.*

the President. He was to be subject to impeachment but, while the Constitution provided that the Chief Justice of the United States Supreme Court would preside at a trial of the President, no presiding officer was mentioned for a trial of the Vice-President. The Constitution prescribed no oath of office for the Vice-President. Nor did it mention any qualifications for the Vice-Presidency; but since, under the original method of election, the Vice-President would be the presidential candidate who received the second highest number of votes after the choice of the President, he would have the same qualifications as President (*i.e.*, be a natural born citizen, at least thirty-five years of age, and fourteen years a resident within the United States).²²

The original method of election was designed to insure that the Vice-President be a person comparable in stature to the President. Its purpose was soon frustrated because the electors, each of whom had two votes for President, would cast one vote for the candidate they wanted as President and the other for their vice-presidential choice.²³ In the election of 1800, most of the Republican electors voted for Thomas Jefferson and Aaron Burr, intending Jefferson for President and Burr for Vice-President. Burr received as many votes as Jefferson so that the House of Representatives was required to choose between them for President. This occurrence caused the mode of election to be modified in 1804 by the adoption of the twelfth amendment, which provided that the electors would cast two distinct votes—one designated for President and one for Vice-President. In order to insure that the Vice-President would have the same qualifications as the President, the words “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President . . .” were inserted in the amendment.²⁴

Following the adoption of the twelfth amendment, the Vice-Presidency rapidly declined in prestige.²⁵ Candidates for the office were now selected with a view to balancing the ticket and appeasing dissident elements in the presidential candidate's party. Little attention was given to the vice-presidential candidate's suitability for the Presidency. It was not until the twentieth century that this decline was arrested and the office began to take on greater significance in the framework of government.

Today, the Vice-President is a vital part of the executive machinery. He sits as a member of the Cabinet and the National Security Council; he is Chairman of the Committee on Equal Employment Opportunity, of the National Aeronautics Space Council, and of the Advisory Council of the Peace Corps; he coordinates various government programs, acts as a

22. Ibid.

23. Ibid.

24. U.S. Const. amend. XII.

25. See *From Failing Hands* 79-88.

liaison between the executive and legislative branches and as a representative of the President at home and abroad.

While the Vice-President's duties have been relatively few during much of our history, the office proved to be of vital importance on several occasions. Eight Vice-Presidents succeeded to the Presidency upon the death of the President and successfully led the country through these crises.²⁶ Yet the Vice-Presidency has been vacant often. This has been the case each of the eight times when a Vice-President succeeded to the Presidency. It has also been the case when Vice-Presidents George Clinton, Elbridge Gerry, William R. King, Henry Wilson, Thomas A. Hendricks, Garret A. Hobart, and James S. Sherman died, and John C. Calhoun resigned. Between July 9, 1850, and March 4, 1857, the office was occupied for less than two months; and between September 19, 1881, and March 4, 1889, for less than nine months. In each of James Madison's two terms as President, the Vice-President died.

Despite the vacancies which have occurred in the Vice-Presidency through the years, no serious effort was made to devise a means for filling such vacancies until after the assassination of President Kennedy. It was then that politicians and scholars alike finally recognized the necessity of having a Vice-President at all times, since he is the official best able to prepare himself for succession to the Presidency in the event of an emergency.

II. LEGISLATIVE DEVELOPMENT

A. 1881-1962

During the inabilities of Presidents Garfield and Wilson, attempts by Congress to find an acceptable method of handling the inability problem were unsuccessful because of diverse views on the subject.²⁷ From 1921 to 1955, Congress gave practically no attention to the problem. In 1955, Representative Emanuel Celler of New York, Chairman of the House Committee on the Judiciary, ordered the Committee's staff to undertake a study of the inability problem. In November 1955, during the course of this study, the staff prepared and distributed to various jurists, political scientists, and public officials a questionnaire comprised of eleven fundamental questions.²⁸ Among these were: "What was intended by the term 'inability' as used in . . . the Constitution?" "Shall a definition be enacted into law?" "Who shall initiate the question of the President's inability to discharge the powers and duties of his office?" "Once raised, who shall make the determination of inability?" "If temporary, who raises the question that the disability has ceased to exist?" "Once raised, who shall make

26. See generally *id.* at 3-20, 89-233.

27. *Id.* at 133-39, 179.

28. Staff of House Comm. on the Judiciary, 84th Cong., 2d Sess., Report on Presidential Inability 2-3 (Comm. Print 1956).

the determination of cessation?" "In the event of a finding of temporary disability, does the Vice President succeed to the powers and duties of the office or to the office itself?" "Does Congress have the authority to enact legislation to resolve any and all of these questions, or will a constitutional amendment or amendments be necessary?"²⁹

The replies to this questionnaire were extremely varied.³⁰ The Eisenhower heart attack prompted the House Committee on the Judiciary to set up a special subcommittee to look into the matter. Hearings were held in April 1956, and more opinions, similarly varied, were heard.³¹ In April 1957, Attorney General Herbert Brownell appeared before the Subcommittee and, on behalf of the Eisenhower Administration, proposed a constitutional amendment containing the following provisions:³² If the President declared his inability in writing, the Vice-President would thereupon discharge the powers and duties of the office. If the President failed to declare his inability or was unable to do so, the Vice-President, "if satisfied of the President's inability, and upon approval in writing of a majority of the heads of executive departments who are members of the President's Cabinet . . ."³³ would act as President. In either case the President would resume his powers and duties upon his written declaration of recovery.

Since this proposal allowed the President to declare the cessation of his inability, it was criticized on the ground that it would be ineffectual if a disabled President were unwilling to relinquish his powers and duties. It was pointed out that in such a case the President could nullify the action of the Vice-President and Cabinet by immediately declaring his recovery. Various other proposals were made involving either separately or in combination the Vice-President, Cabinet, Congress, Supreme Court, and an Inability Commission.³⁴ After much consideration, the Subcommittee was unable to reach agreement on an approach and so indicated to the full committee on May 16, 1957, which, in turn, made no recommendations to the House of Representatives.

In January and February 1958, the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, under the chair-

29. *Id.* at 3.

30. *Ibid*; Staff of House Comm. on the Judiciary, 85th Cong., 1st Sess., *An Analysis of Replies to a Questionnaire and Testimony at a Hearing on Presidential Inability* (Comm. Print 1957).

31. *Hearings Before the Special Subcommittee on the Study of Presidential Inability of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 20 (1956).

32. *Hearings Before the Special Subcommittee on the Study of Presidential Inability of the House Committee on the Judiciary*, 85th Cong., 1st Sess., ser. 3, at 7-8 (1957).

33. *Id.* at 8.

34. See Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 *Fordham L. Rev.* 73, 112-20 (1963).

manship of Senator Estes Kefauver of Tennessee, held hearings on the subject.³⁵ A number of constitutional experts were heard and many others submitted their views in the form of memoranda and letters. Attorney General William P. Rogers testified and endorsed the Brownell proposal, adding a provision to cover the possibility of a President's disagreeing with a determination of inability made by the Vice-President and Cabinet. He suggested that in such a case the Vice-President, with the approval of a majority of the Cabinet, could bring the disagreement before Congress, which then would decide the matter. If a majority of the House of Representatives voted that the President was disabled and if the Senate concurred by a two-thirds vote, the Vice-President would then discharge the powers and duties of the President until a majority of both Houses decided that the inability had ended or until the end of the term.³⁶

The Brownell proposal, thus modified, was approved in substance by the Subcommittee on Constitutional Amendments on March 12, 1958, but Congress adjourned without considering the matter, and it took no action in 1959 or 1960. Why did Congress fail to solve this problem after the most concerted effort in history? Although there was general agreement on the need for a constitutional amendment as distinguished from a statute, considerable disagreement had manifested itself on a procedure for determining the existence and termination of an inability. Of the numerous proposals advanced, each had its adherents and critics. None was able to muster enough support for passage.

A significant development during this period occurred on March 3, 1958, when the White House released the text of an informal agreement between President Eisenhower and Vice-President Richard M. Nixon, under which the Vice-President would act as President in a case of inability.³⁷ In the event of an inability, the President would, if possible, inform the Vice-President. If he were prevented from communicating with the Vice-President, the Vice-President could decide, after such consulta-

35. Hearings on S.J. Res. 100, 133, 134, 141, 143 & 144, S. 238 & 3113 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 85th Cong., 2d Sess. (1958).

36. *Id.* at 136-40, 155-56.

37. See generally Eisenhower, *The White House Years: Waging Peace* 233-35 (1965). This extra-constitutional agreement has since been followed by President Kennedy and Vice-President Johnson, President Johnson and Speaker John W. McCormack, and President Johnson and Vice-President Hubert Humphrey. Its only application to date occurred when President Johnson entered the Bethesda Naval Hospital in October 1965 for the removal of his gall bladder. It was announced by the White House that Vice-President Humphrey would be standing by while the President was under anesthesia, and for an indefinite period thereafter, and during the period would be ready to make a presidential decision if any situation arose requiring such action. The operation took place without any decisions having to be made by the Vice-President. See *N.Y. Herald Tribune*, Oct. 7, 8, 9 & 10, 1965, p. 1.

tion as seemed to him appropriate, that there was an inability. In either case the President would be empowered to declare the end of his inability. This understanding was intended only as a temporary measure pending action by Congress. Since the agreement did not have the force of law and since it depended entirely on the good will of the President and Vice-President, it was recognized that it was not a permanent solution to the inability problem.

B. 1963-1964

With the election of John F. Kennedy to the Presidency, the problem of presidential inability receded from general congressional and public consciousness. Only a few members of Congress continued to press for action. The Administration seemed little concerned about a permanent solution to the inability problem. Early in 1963, Senators Estes Kefauver and Kenneth B. Keating, having decided to put aside their previous proposals, joined in sponsoring a resolution (S.J. Res. 35)³⁸ which, by constitutional amendment, would clarify the Constitution on the status of the Vice-President in a case of inability and would empower Congress to legislate on the matter of inability. Senator Keating stated:

. . . Senator Kefauver and I . . . agreed that if anything was going to be done, all of the detailed procedures which had been productive of delay and controversy had best be scrapped for the time being in favor of merely authorizing Congress in a constitutional amendment to deal with particular methods by ordinary legislation. This, we agreed, would later allow Congress to pick and choose the best from among all the proposals without suffering the handicap of having to rally a two-thirds majority in each House to do it.³⁹

In an effort to revive interest in the problem, Senator Kefauver commenced hearings of the Subcommittee on Constitutional Amendments on June 11, 1963.⁴⁰ Testimony was taken from seven witnesses. The then Deputy Attorney General, Nicholas deB. Katzenbach, and others testified in support of S.J. Res. 35. Subsequently, on June 25, 1963, the Subcommittee on Constitutional Amendments favorably reported S.J. Res. 35 to the full Committee, but the sudden death of Senator Kefauver in August 1963 brought the progress of the movement virtually to a halt. The Kennedy tragedy revived the inability problem once again. As Senator Keating stated: "As distasteful as it is to entertain the thought, a matter of inches spelled the difference between the painless death of John F. Kennedy and the possibility of his permanent incapacity to exercise the duties of the highest office of the land."⁴¹

38. S.J. Res. 35, 88th Cong., 1st Sess. (1963).

39. S. Rep. No. 1382, 88th Cong., 2d Sess. 18 (1964).

40. Hearings on S.J. Res. 28, 35 & 84 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. (1963).

41. Hearings on S.J. Res. 13, 28, 35, 84, 138, 139, 140, 143 & 147 Before the Subcom-

Following President Kennedy's death, there descended on Congress a flurry of proposals dealing with the problems of presidential inability and the vice-presidential vacancy. Senator Birch Bayh of Indiana, Kefauver's successor as Chairman of the Subcommittee on Constitutional Amendments, announced in December 1963 that the Subcommittee would hold hearings on these problems early in 1964. Senator Bayh, together with several other Senators,⁴² introduced a proposal (S.J. Res. 139)⁴³ containing provisions on inability, the vice-presidential vacancy, and the line of succession beyond the Vice-Presidency. The inability provisions were essentially the same as those embodied in the revised Eisenhower Administration approach.

Meanwhile, the internal machinery of the most powerful legal group in the country—the American Bar Association—went into operation. President Walter E. Craig of the ABA sent out special invitations to twelve lawyers familiar with the problem of presidential inability, inviting them to attend a Conference on Presidential Inability and Succession at the Mayflower Hotel in Washington, D.C., January 20 and 21, 1964.⁴⁴

From this two-day Conference emerged a consensus that the Constitution should be amended to provide:

(1) In the event of the inability of the President, the powers and duties, but not the office, shall devolve upon the Vice President or person next in line of succession for the duration of the inability of the President or until expiration of his term of office;

(2) The inability of the President may be established by declaration in writing of the President. In the event that the President does not make known his inability, it may be established by action of the Vice President or person next in line of succession with the concurrence of a majority of the Cabinet or by action of such other body as the Congress may by law provide;

(3) The ability of the President to resume the powers and duties of his office shall be established by his declaration in writing. In the event that the Vice President and a majority of the Cabinet or such other body as Congress may by law provide shall

mittee on Constitutional Amendments of the Senate Committee on the Judiciary, 88th Cong., 2d Sess. 22 (1964).

42. They were Senators Alan Bible of Nevada, Quentin N. Burdick of North Dakota, Frank E. Moss of Utah, Claiborne deB. Pell of Rhode Island and Jennings Randolph of West Virginia.

43. S.J. Res. 139, 88th Cong., 2d Sess. (1964).

44. The conferees were former Attorney General Herbert Brownell; Walter E. Craig and Lewis F. Powell of the American Bar Association; Professor Paul A. Freund of Harvard Law School; former Deputy Attorney General Ross L. Malone; Dean Charles B. Nutting of the National Law Center; Sylvester C. Smith, Jr., former President of the American Bar Association; Jonathan C. Gibson of Chicago, then Chairman of the Committee on Jurisprudence and Law Reform of the American Bar Association; James C. Kirby, Jr., former chief counsel of the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee; Martin Taylor of New York, chairman of the Committee on Federal Constitution of the New York State Bar Association; Edward Wright of Arkansas, then chairman of the House of Delegates of the American Bar Association; and the author.

not concur in the declaration of the President, the continuing disability of the President may then be determined by the vote of two-thirds of the elected Members of each House of the Congress;

(4) In the event of the death, resignation, or removal of the President, the Vice President or the person next in line of succession shall succeed to the office for the unexpired term; and

(5) When a vacancy occurs in the office of the Vice President the President shall nominate a person who, upon approval by a majority of the elected Members of Congress meeting in joint session, shall then become Vice President for the unexpired term.⁴⁵

The consensus was immediately released to the press. It was endorsed by the ABA on February 17, 1964,⁴⁶ and formally presented to the Subcommittee on Constitutional Amendments on February 24 by President Walter E. Craig and President-elect Lewis F. Powell of the ABA.⁴⁷

At the Senate hearings held during the months of January, February, and March 1964, a number of witnesses, including the author, expressed their support for the ABA consensus. Former President Dwight D. Eisenhower indicated his basic agreement with the proposal in a letter to Senator Birch Bayh, dated March 2, 1964. He said:

Many systems have been proposed but each seems to be so cumbersome in character as to preclude prompt action in emergency. My personal conclusion is that the matter should be left strictly to the two individuals concerned, the President and the Vice President, subject possibly to a concurring majority opinion of the President's Cabinet.⁴⁸

Almost all of the witnesses who testified at these hearings expressed great concern about the glaring flaws in our system of presidential succession and emphasized the necessity for their early elimination. Senator Bayh stated:

Our obligation to deal with the question of Presidential inability is crystal clear.

Here we have a constitutional gap—a blind spot, if you will. We must fill this gap if we are to protect our Nation from the possibility of floundering in the sea of public confusion and uncertainty⁴⁹

The hearings of the Subcommittee on Constitutional Amendments ended on March 5, 1964. On May 27, 1964, the Subcommittee favorably reported to the Senate Committee on the Judiciary a revised S.J. Res. 139, embodying the recommendations of the ABA Conference.⁵⁰

45. Hearings on S.J. Res. 13, 28, 35, 84, 138, 139, 140, 143 & 147, *supra* note 41, at 87. See Kirby, *A Breakthrough on Presidential Inability: The ABA Conference Consensus*, 17 *Vand. L. Rev.* 463 (1964).

46. Special Committee on Presidential Inability and Vice-Presidential Vacancy, 89 *A.B.A. Rep.* 613 (1964).

47. Hearings on S.J. Res. 13, 28, 35, 84, 138, 139, 140, 143 & 147, *supra* note 41, at 84-106.

48. *Id.* at 232.

49. *Id.* at 3.

50. 110 *Cong. Rec.* 22288 (daily ed. Sept. 28, 1964).

On August 4, 1964, the revised S.J. Res. 139 was unanimously approved by the Senate Committee on the Judiciary.⁵¹ On Monday, September 28, 1964, the Senate passed the proposal by voice vote.⁵² Since there were fewer than a dozen Senators on the floor at the time of the vote, Senator John Stennis of Mississippi moved, the following day, to reconsider the vote. He supported the proposal but felt that it would set a dangerous precedent to have a proposed constitutional amendment approved by voice vote and without a sufficient number of legislators present.⁵³ A roll call was taken, and the sixty-five Senators in attendance all voted in favor of the Bayh plan.⁵⁴ This unique achievement represented the first time in history that a House of Congress passed a proposal to deal with presidential inability or vice-presidential vacancy. Congress adjourned without any action having been taken by the House of Representatives.⁵⁵

C. 1965

S.J. Res. 139 was reintroduced in January 1965 as S.J. Res. 1 by Senator Birch Bayh and more than seventy other Senators. It was also introduced in the House of Representatives by Representative Emanuel Celler as H.R.J. Res. 1. Representatives Richard H. Poff of Virginia and William M. McCulloch of Ohio, ranking Republican member on the House Committee on the Judiciary, introduced similar proposals⁵⁶ with the difference that, if there were a disagreement, between the President on the one hand and the Vice-President and Cabinet on the other, as to whether the President had recovered from an inability, Congress would have ten days in which to decide the issue. If it failed to do so within such period, the President would automatically resume his powers and duties. In contrast to their proposals, S.J. Res. 1 and H.R.J. Res. 1 merely required Congress to decide the issue "immediately."

On January 28, 1965, President Lyndon B. Johnson sent a special message to Congress endorsing S.J. Res. 1 and H.R.J. Res. 1, and urging prompt action on them. The President stated:

Favorable action by the Congress on the measures here recommended will, I believe, assure the orderly continuity in the Presidency that is imperative to the success and stability of our system. Action on these measures now will allay future

51. S. Rep. No. 1382, 88th Cong., 2d Sess. 14 (1964).

52. 110 Cong. Rec. 22288 (daily ed. Sept. 28, 1964). See Appendix A *infra*.

53. *Id.* at 22337 (daily ed. Sept. 29, 1964).

54. *Id.* at 22341.

55. This was due to a good deal of resentment in the House over the criticism directed at Speaker John W. McCormack of Massachusetts, who in his early seventies was the immediate successor to President Lyndon Johnson. His ability to act as President, should it become necessary, was questioned in various quarters, largely because of his age. As a result, it was felt that to consider the subject (particularly the vice-presidential vacancy aspect) would be a great insult to the Speaker.

56. H.R.J. Res. 3, 119, 89th Cong., 1st Sess. (1965).

anxiety among our own people, and among the peoples of the world, in the event senseless tragedy or unforeseeable disability should strike again at either or both of the principal Offices of our constitutional system. If we act now, without undue delay, we shall have moved closer to achieving perfection of the great constitutional document on which the strength and success of our system have rested for nearly two centuries.⁵⁷

On the following day, the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary held hearings at which Attorney General Nicholas deB. Katzenbach, former Attorney General Herbert Brownell, President Lewis F. Powell of the ABA, and others testified in support of S.J. Res. 1. Mr. Katzenbach presented his interpretation of the proposed amendment in several areas and concluded by stating that "Senate Joint Resolution 1 represents as formidable a consensus of considered opinion on any proposed amendment to the Constitution as one is likely to find."⁵⁸

On February 1, 1965, the Subcommittee unanimously approved S.J. Res. 1 and reported it to the full Judiciary Committee, which approved it on February 10, 1965, with several changes.⁵⁹ On February 19, 1965, the measure was debated in the Senate.⁶⁰ There was practically unanimous agreement on the part of all who participated in the debate on the need for an amendment to solve the inability and vice-presidential vacancy problems. Disagreement was expressed over whether the amendment should set forth specific procedures for dealing with them, as did S.J. Res. 1, or merely empower Congress to enact procedures by legislation. Senator Everett McKinley Dirksen of Illinois, Republican minority leader, offered a substitute amendment providing: "The commencement and termination of any inability shall be determined by such method as Congress may by

57. White House Press Release, Jan. 28, 1965, in Hearings on S.J. Res. 1, 6, 15, 25 & 28 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 14 (1965).

58. *Id.* at 11.

59. S. Rep. No. 66, 89th Cong., 1st Sess. (1965). It was specified that all written declarations be sent to the "Speaker of the House of Representatives" and the "President of the Senate" rather than "Congress," so as to provide a basis for Congress being called into session, if out of session, to consider a disagreement issue. The Speaker and President pro tempore would be required to call a special session if the President's declaration of resumption were questioned and the Vice-President acting as President did not call a special session.

The expression "principal officers of the executive departments" was substituted for "heads of the executive departments" in order to make it clear that only those who are members of the Cabinet would be permitted to participate in any decision regarding inability, and also to make the language of the amendment consistent with that used in Article II, Section 2, Clause 1 of the Constitution, i.e., the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments" See note 144 *infra*.

60. See 111 Cong. Rec. 3167-204 (daily ed. Feb. 19, 1965).

law provide.”⁶¹ He said that “it has been pretty much of a rule in our constitutional history that we do not legislate in the Constitution. We try to keep the language simple. We . . . offer some latitude for statutory implementation thereafter, depending upon the events and circumstances that might arise.”⁶² Senator Sam J. Ervin of North Carolina opposed the Dirksen Amendment, noting that it “totally ignores one of the crucial questions which has brought this matter to the floor of the Senate. That is the fact that vacancies occur in the office of Vice President.”⁶³ He argued that the Dirksen proposal “would place dangerous power in the hands of Congress,”⁶⁴ since it would give Congress a new power over the President by which “any time that power-hungry men in Congress were willing to go to the extremes that men were willing to go to in those days [*i.e.*, when radical Republicans sought to remove President Andrew Johnson], they could take charge of the Presidency.”⁶⁵ Only by setting out specifics in the Constitution, Senator Ervin said, would the President be sufficiently protected.⁶⁶ Senator Birch Bayh of Indiana, the floor leader of the measure, agreed and pointed out that the Constitution was quite specific in its provisions regarding the Presidency, namely, article II and the twelfth amendment.⁶⁷ The thrust of Bayh’s argument was that the principle of separation of powers would be violated if this specificity were not maintained. He said that the state legislatures would prefer to deal with an amendment containing a specific proposal, and that, unless the amendment were specific, Congress might never settle on a procedure since interest would wane once the amendment had been ratified.⁶⁸ Upon the conclusion of this debate, a vote was taken on the Dirksen substitute amendment, and it was defeated 60 to 12.⁶⁹

An amendment by Senator Strom Thurmond of South Carolina to establish the electoral college as the method of filling a vacancy in the Vice-Presidency was rejected by voice vote.⁷⁰ Senator Roman L. Hruska of Nebraska then proposed an amendment to change from two to seven the number of days that the President would be required to wait before resuming his powers and duties after his declaration of recovery from an inability. Senator Hruska stated:

In these days when much traveling is done by members of our Cabinet, and when on

61. *Id.* at 3175.

62. *Id.* at 3183.

63. *Id.* at 3187.

64. *Ibid.*

65. *Ibid.*

66. *Ibid.*

67. *Ibid.*

68. *Id.* at 3170-71, 3189.

69. *Id.* at 3190.

70. *Id.* at 3192.

occasion the Vice President also travels frequently, if there would be . . . a declaration by the President in the absence of these parties the 48-hour period would obviously prove to be much too small.

. . . I feel that 7 days would be an appropriate and adequate time for the members of the Cabinet to . . . inform themselves of the actual condition of the President, perhaps visit with him, perhaps visit with his personal physician.⁷¹

This amendment was accepted.⁷²

Senator John O. Pastore of Rhode Island urged that the amendment should require Congress to decide a disagreement issue without transacting any other business in the interim. “[W]e ought to stay here,” said Pastore, “until we decide that question, even if we must sit around the clock, or around the calendar, because this problem involves the Presidency of the United States.”⁷³ Senators Hruska and Ervin remarked that such a restriction would be unwise as evidence might have to be taken in committee, or the President examined, before a decision could be reached.⁷⁴ While this was going on, an urgent situation could arise necessitating Congressional action.⁷⁵ The force of this reasoning led to the rejection of Pastore’s suggestion.⁷⁶

Senator Ross Bass of Tennessee referred to the possibility of Congress’ delaying in filling a vacancy in the Vice-Presidency in an effort to keep the Speaker first in line of succession.⁷⁷ He, therefore, offered an amendment which would require the President to nominate “immediately” a person to fill the vacancy. His amendment, however, was rejected by voice vote.⁷⁸ S.J. Res. 1, as amended, was then unanimously approved by a vote of 72 to 0.⁷⁹

Meanwhile, the House Committee on the Judiciary had held hearings on February 9, 10, 16, and 17, 1965, during which support was expressed for the McCulloch-Poff ten-day time limitation with respect to congressional action on a disagreement issue. It was maintained that a limitation was essential because of the possibility that Congress might delay unreasonably in deciding the issue or make no decision at all, with possible disastrous consequences to the country. On the other hand, it was pointed out that situations might arise where ten days or any other time limitation would be insufficient time for testimony to be heard and a considered

71. Ibid.

72. Id. at 3194.

73. Ibid.

74. Id. at 3195.

75. Id. at 3195-97.

76. Id. at 3197.

77. Ibid.

78. Id. at 3199.

79. Id. at 3203.

decision reached.⁸⁰ Former Attorney General Herbert Brownell testified that the possibility of a disagreement was remote, but that, if it did occur, Congress would act with all due speed. He stated: “. . . I have always found in my experience that men under the pressure of national or international crisis do act responsibly, but if the occasion arose when they didn’t, I think public opinion would force them to do it, or destroy their usefulness as public officials thereafter.”⁸¹

H.R.J. Res. 1 was approved by the House Committee on the Judiciary on March 24, 1965.⁸² Several changes were made. Section 3 was clarified to permit the President, in a case where he had voluntarily declared his inability, to resume his powers and duties upon his declaration of recovery.⁸³ The ten-day time limitation was adopted, and words were added requiring Congress to assemble immediately, if not in session, to pass on a disagreement issue.⁸⁴ The Committee retained the two-day provision relating to the President’s resumption of his powers and duties after his declaration of recovery where he had been involuntarily declared disabled.

H.R.J. Res. 1 was cleared by the House Rules Committee on March 31,⁸⁵ and it was considered by the House of Representatives on April 13. In his opening remarks to the House, Representative Emanuel Celler observed that “everyone will agree that amending . . . the charter . . . of our Nation is not a task to be undertaken lightly. Today, however, we are faced with filling a gap which has existed since our beginnings, and this

80. Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 234-36, 244-45 (1965). Compare *id.* at 4, 169.

81. *Id.* at 243.

82. 111 Cong. Rec. 5621 (daily ed. March 24, 1965).

83. In his statement to the House Committee on the Judiciary, Attorney General Katzenbach urged that there be a provision “which would clearly enable the President to terminate immediately any period of inability he has voluntarily declared.” Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 107 (1965). The language of the Senate proposal was unclear whether the President, in a case where he had declared himself disabled, would have to follow the recovery procedure prescribed for situations where an inability was declared by the Vice-President and Cabinet. See S. Rep. No. 66, 89th Cong., 1st Sess. 12-14 (1965); S.J. Res. 1, 89th Cong., 1st Sess., §§ 2-5 (1965), as amended. Senator Birch Bayh said that, under S.J. Res. 1, a President did not have to follow this procedure in a case of voluntary disability. 111 Cong. Rec. 3188-89 (daily ed. Feb. 19, 1965); *id.* at 14830 (daily ed. June 30, 1965).

84. See H.R. Rep. No. 203, 89th Cong., 1st Sess. 3 (1965). Certain language changes made by the Senate Committee on the Judiciary in S.J. Res. 1, see note 59 *supra* and accompanying text, were also made in H.R.J. Res. 1. “President pro tempore of the Senate,” however, was used instead of “President of the Senate.”

85. The vote was six to four. Representative William Colmer of Mississippi disliked the method for declaring a President disabled, saying that it might lead to a coup headed by the Vice-President. Representative James J. Delaney of New York expressed a preference for a means of filling a vacancy in the Vice-Presidency through the elective route. N.Y. Times, April 1, 1965, p. 20, col. 1.

gap becomes more threatening as the complexity of the domestic and foreign policy grows.”⁸⁶ Representatives Celler, McCulloch, Poff, and others forcibly urged the adoption of the proposal endorsed by the Judiciary Committee. They underscored the great need for the amendment and argued that it represented as good a solution as can be found to the problems of presidential inability and the vice-presidential vacancy. In the words of Representative Celler:

This is by no means . . . a perfect bil [sic]. No bill can be perfect. . . . The world of actuality permits us to attain no perfection. . . . But nonetheless, this bill has a minimum of drawbacks. It is [a] well-rounded, sensible, and efficient approach toward a solution of a perplexing problem—a problem that has baffled us for over 100 years.⁸⁷

Relying on Walter Lippmann’s words regarding the proposed amendment, Representative Celler added:

It is a great deal better than an endless search for the absolutely perfect solution, which will never be found and, indeed, is not necessary.⁸⁸

Representative McCulloch stated:

We must provide the means for an orderly transition of Executive power in a manner that respects the separation of powers doctrine, and maintains the safeguards of our traditional checks and balances. I believe that House Joint Resolution 1, as amended . . . answers these needs, and will undoubtedly correct the shortcomings of the Constitution with respect to presidential inability and succession.⁸⁹

There was some opposition, however, to H.R.J. Res. 1. Representative Clarence J. Brown of Ohio thought it unwise and unnecessary. He criticized its method of filling a vacancy in the Vice-Presidency. He said that the amendment would take away “from the House a constitutional right it now has to select a President”⁹⁰ (by selecting the Speaker who is the successor to the President when there is no Vice-President) and that “the man named Vice President could be an individual who was never elected to any public office.”⁹¹ Representative Roman C. Pucinski of Illinois moved to strike the vice-presidential vacancy section from the measure.⁹² The motion was rejected by a vote of 140 to 44.⁹³ Representative Charles M. Mathias, Jr. of Maryland moved to substitute a new vice-presidential vacancy section, as follows:

Sec. 2. The Congress may by law provide for the case of a vacancy in the office

86. 111 Cong. Rec. 7668 (daily ed. April 13, 1965).

87. *Id.* at 7667.

88. *Id.* at 7668, citing N.Y. Herald Tribune, June 9, 1964, p. 20, col. 5.

89. *Id.* at 7673.

90. *Id.* at 7664.

91. *Ibid.*

92. *Id.* at 7690.

93. *Id.* at 7693.

of Vice President and for the case of removal, death, resignation or inability both of the President and the Vice President, declare what official would then act as President and such official would act accordingly until disability be removed or a President would be elected.⁹⁴

The amendment was rejected by voice vote.⁹⁵

Representative Arch A. Moore, Jr. of West Virginia sought to amend that part of the measure under which the Vice-President would continue to act as President, pending resolution by Congress of a disagreement as to the President's restoration to capacity. Moore, and several others, felt that the President should act during this period. "[A]ll presumptions," he said, "should be in favor of the President of the United States."⁹⁶ If the Vice-President is permitted to act during this period, Moore added, "he could resort to many manipulations that would never permit the President of the United States . . . to present his case to the Congress of the United States."⁹⁷ In answer to this objection, the argument was made that, since the capacity of the President would have been seriously challenged, it was the wiser and less hazardous course not to have him act during this period.⁹⁸ The Moore Amendment was rejected by a vote of 122 to 58.⁹⁹ Representative H. R. Gross of Iowa proposed an amendment to H.R.J. Res. 1, requiring a roll-call vote whenever Congress voted on the President's nominee for Vice-President, and said that he would make the same proposal regarding a vote on a disagreement issue in the inability situation.¹⁰⁰ Representative Celler opposed this amendment. He argued that the House or Senate could demand such a vote under its rules and that it, therefore, was unnecessary.¹⁰¹ Thereupon, the Gross Amendment was defeated by votes of 102 to 92 and 130 to 115.¹⁰²

Representative Richard H. Poff successfully amended the proposed amendment by inserting words under which Congress, if not in session, would have to assemble within forty-eight hours after receiving a challenge, from the Vice-President and a majority of the Cabinet, directed at a presidential declaration of recovery.¹⁰³ The debate concluded with

94. *Ibid.*

95. *Id.* at 7694.

96. *Ibid.*

97. *Ibid.*

98. Representative Peter W. Rodino of New Jersey pointed out that the matter might never get to Congress if the President immediately resumed his powers and duties and discharged the Cabinet before a declaration of challenge could be sent to Congress. *Id.* at 7695. See note 156 *infra*.

99. 111 Cong. Rec. 7696 (daily ed. April 13, 1965).

100. *Id.* at 7696-97.

101. *Id.* at 7697.

102. *Ibid.* A roll-call vote requirement may be found in the Constitution with respect to Congress' overriding of a presidential veto. U.S. Const. art. I, § 7.

103. 111 Cong. Rec. 7697-98 (daily ed. April 13, 1965). The "forty-eight hour"

Speaker John W. McCormack giving his full support to the measure. He stated:

I have lived for 14 months in the position of the man who, in the event of an unfortunate event happening to the occupant of the White House, under the law then would have assumed the Office of Chief Executive of our country. I can assure you, my friends and colleagues, that a matter of great concern to me was the vacuum which existed in the subject of determining inability of the occupant of the White House, if and when that should arise.

I have in my safe in my office a written agreement. As has been well said, it is outside the law. It is an agreement between individuals. But it was the only thing that could be done under the circumstances, when we do not have a disability law in relation to the President in existence.

We have made a marked contribution by this resolution, and particularly by section 3 and section 4.¹⁰⁴

He added:

We cannot legislate for every human consideration that might occur in the future. All we can do is the best that we can under the circumstances. The considerations of the committee and the deliberations of the members of both parties have resolved the problem confronting us in the best manner possible, having in mind the fact that with all our strengths we have weaknesses as human beings.¹⁰⁵

A vote was then taken, and H.R.J. Res. 1, as amended, was approved 368 to 29.¹⁰⁶

In order to resolve the differences between the House and Senate versions of the amendment, a Conference Committee was appointed.¹⁰⁷ It met several times during the following weeks and was divided, along House and Senate lines, on whether a time limitation should be placed upon Congress in deciding a disagreement issue. The House conferees insisted on a ten-day limitation, while the Senate conferees wanted no limitation at all.¹⁰⁸ On June 23, 1965, after a two month deadlock, agreement was reached on a twenty-one day limitation.¹⁰⁹ In addition, the Conference Committee accepted the House version of section 3, permitting the President, in the event of a voluntary declaration of inability, to resume his powers and duties immediately upon transmitting his declaration of recovery to the President pro tempore and Speaker.¹¹⁰ The Com-

amendment was introduced at the suggestion of Speaker McCormack. Letter from Representative Richard H. Poff to Donald E. Channell of the American Bar Association, April 15, 1965.

104. 111 Cong. Rec. 7698 (daily ed. April 13, 1965).

105. Ibid.

106. Id. at 7699. See Appendix C *infra*.

107. The conferees were Senators Birch E. Bayh, James O. Eastland, Sam J. Ervin, Everett M. Dirksen and Roman L. Hruska, and Representatives Emanuel Celler, Byron G. Rogers, James C. Corman, William M. McCulloch, and Richard H. Poff.

108. H.R. Rep. No. 564, 89th Cong., 1st Sess. 4 (1965).

109. Ibid.

110. Id. at 3.

mittee compromised on a four-day period within which the Vice President and Cabinet could challenge a President's declaration of recovery where the inability determination had not been made by the President.¹¹¹ It also agreed to accept the provision in the House version requiring Congress to convene within forty-eight hours, if not in session, to settle a disagreement.¹¹² The expression "the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide" was changed to "the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide."¹¹³ This change was made at the suggestion of Senator Hruska in order to make it clear that, when and if Congress designated another body to replace the Cabinet, it could not eliminate the Vice-President.¹¹⁴

The Conference Report was passed by voice vote in the House of Representatives on June 30, 1965.¹¹⁵ It was considered in the Senate later that same day. Senators Robert F. Kennedy of New York and Eugene J. McCarthy of Minnesota expressed reservations about the method prescribed for determining inability. Senator Kennedy said a President might discharge his Cabinet. A conflict could arise, he said, as to

whether the President had, in fact, fired the Cabinet at the time they had met and decided to put in a new President. What we could end up with, in effect, would be the spectacle of having two Presidents both claiming the right to exercise the powers and duties of the Presidency, and perhaps two sets of Cabinet officers both claiming the right to act.¹¹⁶

The concern of these two Senators was lessened by virtue of the provision allowing Congress to establish a body to replace the Cabinet in functioning with the Vice-President. Senator Albert Gore of Tennessee, referring to this "other body" provision, argued that it would permit the Vice-President to choose between the Cabinet and the other body created by Congress.¹¹⁷ He said that the use of the expression "either/or" put the two groups on a par.¹¹⁸ Senator Bayh, pointing to the abundance of legislative history on the point, said that under the proposed amendment, the Cabinet would have the responsibility unless Congress passed a law appointing another body, in which case the "newly created body and not

111. *Id.* at 4.

112. *Ibid.*

113. *Id.* at 2.

114. This statement is based on information given to the author by persons who worked with the Conference Committee.

115. 111 Cong. Rec. 14668 (daily ed. June 30, 1965).

116. *Id.* at 14832.

117. *Id.* at 14834-39.

118. *Id.* at 14834.

the Cabinet would act with the Vice President.”¹¹⁹ Senator Jacob Javits of New York remarked that, if the power to establish another body were exercised, he would interpret it “to give exclusivity to the other body,” since it would be “completely contrary to the purpose of Congress to create two bodies which could compete with one another.”¹²⁰ Senator Gore requested and obtained postponement of further discussion in order to study the point in greater detail.¹²¹

On Tuesday, July 6, 1965, the measure again came up for consideration in the Senate. Senator Gore reiterated his objection to the proposed amendment because of the “either/or” expression. By virtue of this wording, argued Gore, “a Vice President would be in a position to ‘shop around’ for support of his view that the President is not able to discharge the duties of his office.”¹²² Senator Birch Bayh said that the language was clear—that, if Congress designated another body, that body would supersede the Cabinet.¹²³ Senator Dirksen agreed and said that he could not imagine a Vice-President acting in this manner, but that if he did, the people would not tolerate it and his political future would be ruined.¹²⁴ Dirksen noted:

[L]anguage is not absolute. . . . [I]nterpretations of all kinds can be placed upon language

Fashioning language to do what we have in mind, particularly when we are subject to the requirement of compression for constitutional amendment purposes, is certainly not an easy undertaking.¹²⁵

He added: “I believe we have done a reasonably worthwhile job insofar as the feeble attributes of the language can accomplish it.”¹²⁶ Senator Ervin observed that “the conference report . . . would submit to the States the very best possible resolution on the subject obtainable in the Congress of the United States as it is now constituted.”¹²⁷

At the conclusion of the debate, the Senate approved the measure by a vote of 68 to 5,¹²⁸ and a few days later it was on its way to the state legislatures for ratification as the Twenty-Fifth Amendment to the Constitution.

119. Id. at 14835.

120. Id. at 14838.

121. Id. at 14838-39.

122. Id. at 15023 (daily ed. July 6, 1965).

123. Id. at 15029.

124. Id. at 15027.

125. Id. at 15026.

126. Id. at 15028.

127. Id. at 15030.

128. Id. at 15031-32. The five Senators who voted against it were Senators Gore, Frank J. Lausche of Ohio, McCarthy, Walther F. Mondale of Minnesota, and John G. Tower of Texas.

III. ANALYSIS OF THE PROPOSED AMENDMENT

A. *Section 1*

In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

This section would specifically confirm the Tyler precedent whereby a Vice-President becomes President when there is a vacancy in the presidential office because of the President's death. It would also extend the precedent to cover vacancies in the Presidency due to resignation¹²⁹ and removal, neither of which has occurred in American history. In any of these cases, the Vice-President would serve as President for the remainder of the unexpired term.

B. *Section 2*

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

This section is designed to cover the situation where the Vice-President succeeds to the Presidency upon the President's death, resignation or removal, or where the Vice-President dies, resigns, or is removed.¹³⁰ The President would nominate the person that he would like to have for his Vice-President. Congress would then vote upon the nomination. If a majority of each House confirmed the nomination, the person would become Vice-President for the remainder of the President's term.¹³¹ The nominee would have to be a natural born citizen of the United States, at least thirty-five years of age, and a resident within the United States for a minimum of fourteen years.¹³² The Houses of Congress would vote separately on the nomination, and the vote required would be a majority of those members present and voting, provided a quorum were present.¹³³

129. See 3 U.S.C. § 20 (1964), which sets out the procedure for resignation.

130. Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 87, 196, 246 (1965).

131. Confirmation by Congress is necessary so that, if a vacancy occurs when Congress is out of session, it could not be filled until the next regular session or at a special session called for that purpose by the President. *Id.* at 45, 49. Until a vacancy is filled, the Speaker of the House of Representatives, or whoever might be first in the line of succession at the time, would be the heir apparent. The proposed amendment leaves intact the power of Congress to establish a line of succession beyond the Vice-Presidency. U.S. Const. art. II, § 1. The present succession law, 3 U.S.C. § 19 (1964), would be operative if there were simultaneous vacancies in the offices of President and Vice-President. See 111 Cong. Rec. 3200 (daily ed. Feb. 19, 1965) (remarks of Senators Bayh and Holland); *id.* at 7682 (daily ed. April 13, 1965) (remarks of Representatives Mathias and Poff).

132. Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 48 (1965).

133. That separate sessions are called for under § 2 and under § 4 as well, see 111 Cong. Rec. 3203 (daily ed. Feb. 19, 1965) (remarks of Senator Hruska); *id.* at 7675-76

Before making a nomination, the President probably would seek the advice and views of the congressional leaders. His nominee might be asked to undergo hearings in the House and Senate. If the nomination were not confirmed, the President would nominate another Vice-President.¹³⁴

Since the House of Representatives has never had any constitutional vote in approving presidential nominees, that being reserved for the Senate, the amendment would give the House a different type of function to perform. In so doing, the amendment would elevate the Vice-Presidency above executive appointments and would give the people a greater voice in the selection of a Vice-President than if the power of confirmation were given to the Senate alone.

In giving the President a dominant role in filling a vacancy in the Vice-Presidency, the proposed amendment is consistent with present practice whereby the presidential candidate selects his own running mate who must be approved by the people through their representatives. It is practical because it recognizes the fact that a Vice-President's effectiveness in our Government depends on his rapport with the President. If he is of the same party and of compatible temperament and views, all of which would be likely under the proposed amendment, his chances of becoming fully informed and adequately prepared to assume presidential power, if called upon, are excellent.

C. Section 3

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

This section would provide for an Acting President in a case of presidential inability.¹³⁵ Under section 3, a President would be authorized to

(daily ed. April 13, 1965) (remarks of Representatives Celler and Basil L. Whitener); *id.* at 7677-78 (remarks of Representatives Celler, Poff and Edward Hutchinson); Hearings on S.J. Res. 1, 6, 15, 25 & 28 Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. 10 (1965); Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 45, 60, 106 (1965). See also *Missouri Pac. Ry. v. Kansas*, 248 U.S. 276 (1919).

134. There is no limit on the number of nominations which can be made. Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 50 (1965).

135. The legislative history indicates that the term "inability" is intended to cover any state of facts preventing the President from discharging the powers and duties of his office. It might be due to physical or mental illness, kidnaping, capture by an enemy, etc. As was stated by Senator Birch Bayh: "[T]he intention of this legislation is to deal with any type of inability, whether it is from traveling from one nation to another, a breakdown of communications, capture by the enemy or anything that is imaginable. The inability to perform the powers and duties of the office, for any reason is inability

declare his own disability, and he would be encouraged to do so, since, if he did, his declaration of restoration to capacity could not be challenged.¹³⁶ "A President would always hesitate to utilize the voluntary mechanism if he knew that a challenge could be lodged when he sought to recapture his Office."¹³⁷

The Vice-President would become Acting President under this section as soon as the President transmitted a written declaration of inability to the President pro tempore of the Senate and the Speaker of the House of Representatives.¹³⁸ The Vice-President would cease to be Acting President as soon as the President transmitted his declaration of recovery to these two officials.¹³⁹

This is the section that can be expected to be used in most future cases of presidential inability. Former Attorney General Herbert Brownell has said:

under the terms that we are discussing." Hearings on S.J. Res. 1, 6, 15, 25 & 28, *supra* note 133, at 20. "[T]he word 'inability' and the word 'unable' . . . mean that he is unable either to make or communicate his decisions as to his own competency to execute the powers and duties of his office." 111 Cong. Rec. 3200 (daily ed. Feb. 19, 1965) (remarks of Senator Bayh). See *id.* at 14832-33 (daily ed. June 30, 1965) (remarks of Senators Robert F. Kennedy and Bayh).

136. *Id.* at 7669 (daily ed. April 13, 1965) (remarks of Representative Celler); *id.* at 14667 (daily ed. June 30, 1965) (remarks of Representative Poff); *id.* at 14830 (remarks of Senator Bayh); see S. Rep. No. 66, 89th Cong., 1st Sess. 3 (1965); H.R. Rep. No. 203, 89th Cong., 1st Sess. 2 (1965). See also note 83 *supra*.

Although, in this situation, there could be no challenge to the President's restoration, the Vice-President and the Cabinet would not thereafter be precluded from declaring the President disabled under § 4 of the proposed amendment.

137. 111 Cong. Rec. 7672 (daily ed. April 13, 1965).

138. Whenever the Vice-President acted as President, he would lose his title as President of the Senate. *Id.* at 3188 (daily ed. Feb. 19, 1965). The President pro tempore would become President of the Senate. The question of whether the Vice-President would have to take the presidential oath before becoming Acting President is left for future resolution. It would seem that he should not, since the duty of acting as President would be encompassed in his vice-presidential oath to perform faithfully his duties. See 23 Stat. 22 (1884), 5 U.S.C. § 16 (1964), for the form of oath taken by the Vice-President and other officials in the government. The legislative history on this point is inconclusive. See Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 87 (1965).

139. The intention of Congress regarding written declarations was summarized in the Report of the Senate Committee on the Judiciary: "It is the intention of the committee that for the best interests of the country to be served, notice by all parties should be public notice. The committee feels that notice by transmittal to the President [pro tempore] of the Senate and the Speaker of the House of Representatives guarantees notice to the entire country. . . . It is further understood by the committee that should the President [pro tempore] . . . and the Speaker . . . not be found in their offices at the time the declaration was transmitted that transmittal to the office of such presiding officers would suffice for sufficient notice under the terms of this amendment." S. Rep. No. 66, 89th Cong., 1st Sess. 2 (1965).

A typical situation that is covered by this section is one in which the President is physically ill and his doctors recommend temporary suspension of his normal governmental activities, to facilitate his recovery. Other situations that have been visualized are those where the President might be going to have an operation, or where he was going abroad and might be out of reliable communication with the White House for a short period.¹⁴⁰

This section can be viewed as sufficiently broad to permit the President to declare himself disabled either for an indefinite or a specified period of time, and to name the hour when the Vice-President is to begin as Acting President.¹⁴¹ It can be argued that his declaration could be conditional, stating, for example: “ ‘[I]f in the event I am under anesthesia or similarly unable, I wish you to assume those duties’ ”¹⁴² The legislative history indicates that this section should be broadly interpreted.¹⁴³

D. *Section 4*

Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

This section also provides for an Acting President in a case of inability. It covers the most difficult case, that is, where the President cannot or

140. Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 240 (1965).

141. *Id.* at 98-99, 240; see Hearings on S.J. Res. 1, 6, 15, 25 & 28, *supra* note 133, at 20-21, 64-65.

142. Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 99 (1965) (remarks of Attorney General Katzenbach). Once the Vice-President had commenced his role as Acting President, the proposed amendment contemplates that he would continue in such capacity until the President terminated it by a subsequent declaration.

143. See notes 140-42 *supra*.

refuses to declare his own inability. In that event the Vice-President and a majority of the "principal officers of the executive departments"¹⁴⁴ (popularly known as the Cabinet) would be empowered to declare the President disabled by transmitting a written declaration of this fact to the President pro tempore and the Speaker. Although it need not be, the declaration would most probably be a joint one.¹⁴⁵ The question of whether an inability had occurred could be initiated for discussion purposes by the Vice-President or any member of the Cabinet.¹⁴⁶

The President could announce his own recovery but he would then have to wait four days before resuming his powers and duties.¹⁴⁷ In the meantime, the Vice-President and the Cabinet would have an opportunity to review the situation. They could agree to the President's taking over immediately or at any time short of four days.¹⁴⁸ If they disagreed with

144. The expression refers to the Secretaries of State, Treasury, and Defense; the Attorney General; the Postmaster General; and the Secretaries of the Interior, Agriculture, Commerce, Labor, and Health, Education and Welfare, and Housing and Urban Development. See note 59 *supra*. For clear manifestations of congressional intent on the point, see 111 Cong. Rec. 3175, 3200-01 (daily ed. Feb. 19, 1965) (setting out the study of the Library of Congress' Legislative Reference Service); *id.* at 7669, 7676 (daily ed. April 13, 1965); *id.* at 14835 (daily ed. June 30, 1965); H.R. Rep. No. 203, 89th Cong., 1st Sess. 3 (1965); Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 52-55, 103, 256 (1965). The House Committee on the Judiciary stated in its report: "In case of the death, resignation, absence, or sickness of the head of any executive department, the acting head of the department would be authorized to participate in a presidential inability determination." H.R. Rep. No. 203, 89th Cong., 1st Sess. 3 (1965). See 111 Cong. Rec. 14833 (daily ed. June 30, 1965) (remarks of Senator Robert F. Kennedy). But see *id.* at 3202 (daily ed. Feb. 19, 1965) (remarks of Senators Bayh and Hart). The expression "executive departments" is used in § 4 in both the singular and the plural. The plural was what was intended. The use of the singular was inadvertent.

145. *Id.* at 14837 (daily ed. June 30, 1965) (remarks of Senators Bayh and Javits); see *id.* at 14831, where Senator Hruska states that Congress itself has no right to initiate action.

In answer to the question of how a written declaration might be prepared under § 4, former Attorney General Brownell stated: "Undoubtedly the Justice Department would prepare the papers, and the action would be taken at a joint meeting of the Vice President and the Cabinet members. It might not even be a matter of public knowledge as to who signed first. That particular point would fade into insignificance in getting the group action." Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 247 (1965).

146. *Id.* at 79, 82 (remarks of Senator Bayh).

147. 111 Cong. Rec. 7670-71 (daily ed. April 13, 1965) (remarks of Representative Celler); *id.* at 14667 (daily ed. June 30, 1965) (remarks of Representative Poff); *id.* at 14830 (remarks of Senator Bayh); Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 58 (1965); S. Rep. No. 66, 89th Cong., 1st Sess. 3 (1965); H.R. Rep. No. 203, 89th Cong., 1st Sess. 3 (1965).

148. 111 Cong. Rec. 3203 (daily ed. Feb. 19, 1965) (remarks of Senator Bayh); Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 243 (1965) (remarks of former Attorney General Brownell).

the President's declaration, they would send a written declaration of this fact, within four days, to the President pro tempore and the Speaker of the House, and Congress would be required to decide the issue. If Congress were not then in session, it would be obliged to assemble within forty-eight hours from the time the Vice-President and Cabinet transmitted their declaration to the President pro tempore and Speaker. It would be incumbent upon the Vice-President who is acting as President to fix a time certain within forty-eight hours as to when Congress must assemble. If he failed to do so, the President pro tempore and Speaker would be obliged to call their respective Houses into session within the forty-eight hour period.¹⁴⁹ Upon their failure to do so, Congress would have to come into session within forty-eight hours on its own initiative.

Congress would have twenty-one days from the time of the transmittal, or from the time it is required to assemble, as the case may be, in which to decide the disagreement. The Vice-President would continue to act as President, pending the decision of Congress, so that the powers and duties of President would never be in the hands of a person whose capacity had been seriously challenged.¹⁵⁰

Congress would have three choices under the twenty-one day limitation: to decide in favor of the President or the Vice-President or to reach no decision at all.¹⁵¹ If Congress failed to reach a decision within this time, or if more than one-third of either House sided with the President,¹⁵² the President would immediately resume his powers and duties. If two-thirds of both Houses supported the Vice-President and a majority of the Cabinet, the Vice-President would continue as Acting President.¹⁵³ In deciding the issue, Congress could proceed as it thought best. It might request the President to undergo medical tests and examinations, or to submit to questioning at hearings.¹⁵⁴

149. 111 Cong. Rec. 7697-98 (daily ed. April 13, 1965).

150. See text accompanying notes 96-99 & note 147 *supra*.

151. "Circumstances may be such that the Congress by tacit agreement may want to uphold the President in some manner which will not amount to a public rebuke of the Vice President who is the Acting President. . . . [This] . . . option furnishes the graceful vehicle." 111 Cong. Rec. 7673 (daily ed. April 13, 1965) (remarks of Representative Poff).

152. *Id.* at 14667 (daily ed. June 30, 1965) (remarks of Representative Poff). "[I]f one House voted but failed to get the necessary two-thirds majority, the other House would be precluded from using the 21 days and the President would immediately resume the powers and duties of his office." *Id.* at 14831 (remarks of Senator Bayh).

153. A two-thirds vote was decided upon so as to weight the procedure as heavily in favor of the elected President as practicable. *Id.* at 3187 (daily ed. Feb. 19, 1965) (remarks of Senator Ervin). It takes only a majority vote in the House of Representatives to impeach a President and two-thirds in the Senate to remove him. U.S. Const. art. I, §§ 2, 3.

154. Hearings on S.J. Res. 1, 6, 15, 25 & 28, *supra* note 133, at 21-23, 29, 35; 111 Cong. Rec. 3195-96 (daily ed. Feb. 19, 1965) (remarks of Senators Ervin and Hruska).

The Vice-President's participation in determining presidential inability is proper. Since he is the person who would act as President in a case of inability, he should have a voice in determining when to act. As Representative Richard H. Poff said during the debates in the House of Representatives:

The Vice President, a man of the same political party, a man originally chosen by the President, a man familiar with the President's health, a man who knows what great decisions of state are waiting to be made, and a man intended by the authors of the Constitution to be the President's heir at death or upon disability, surely should participate in a decision involving the transfer of presidential powers.¹⁵⁵

There are several reasons why responsibility in inability determinations was placed upon the Cabinet. Since they are appointed by the President, they would not be likely to take steps to have him declared disabled unless he actually were disabled. Since they work closely with the President and meet with him frequently, they would be more readily aware than some other body of his condition and of whether there was a need for an Acting President. The chances of the Cabinet's acting unanimously on a matter of this importance, which would add weight to any decision and encourage public acceptance of it, are greater than with another group, particularly a group having members of different political parties. Since it has come to be considered an integral part of the executive branch of government, its selection is consistent with the fundamental principle of separation of powers.

History indicates that the Cabinet would not decline to exercise this power if an occasion arose requiring it to do so. The Cabinet of President James Garfield was unanimous in deciding that the President was disabled but did not have the power to declare disability and hesitated to take any initiative because of the fear that the Vice-President would become President for the remainder of the term. During the Wilson inability, the Cabinet sought to ascertain whether the President was disabled, and it seems in retrospect that, if they had had the power to declare him disabled, they would have used it in a responsible manner. It seems clear that the Cabinet would use this power if, and only if, it were necessary.

If, however, future circumstances indicated that the Cabinet was not a workable body, Congress would have the power under the proposed amendment to entrust to another body the responsibility of determining, with the Vice-President, presidential inability.¹⁵⁶

155. *Id.* at 7672-73 (daily ed. April 13, 1965).

156. One of the points frequently made during the hearings and the congressional debates was that the President could discharge his Cabinet before it had a chance to declare him disabled, thus nullifying the prescribed method. See *id.* at 3198, 3201 (daily ed. Feb. 19, 1965) (remarks of Senator Hart); text accompanying note 116 *supra*; Hearings on S.J. Res. 1, 6, 15, 25 & 28, *supra* note 133, at 28. This is certainly possible but, if a President were to act in such a manner, Congress could cope with the situation under

IV. CONCLUSION

Several times in our history, the Government has been paralyzed because the President was disabled. Similarly, if the President had died or become disabled on occasions when there was a vacancy in the Vice-Presidency, chaos and confusion would have been likely to result. The deficiencies in the Constitution which permitted the existence of these situations must be remedied. It is of critical importance to the Nation's security that a President's illness should not be allowed to halt the work of government, and that there should be available at all times a Vice-President of the United States.

The proposed twenty-fifth amendment, which would provide procedures both for determining a President's inability and for filling vacancies in the Vice-Presidency, is desperately needed. This has been demonstrated time and again in our history. Despite widespread recognition of the serious need for a method of determining presidential inability and, despite a long search for an acceptable method, none has ever been found which could command enough strength to be proposed by Congress, much less ratified by the state legislatures. Finally, a method commanding widespread support as an acceptable and workable procedure has been found and proposed by Congress. It is doubtful that a better proposal could be devised, considering the complexity of the problems involved and the great diversity of views. The proposed twenty-fifth amendment has been made possible because of the willingness of Democrats and Republicans alike to compromise in the best interests of the Nation. It remains for the state legislatures to ratify it and to make it a permanent part of the

the proposed amendment by exercising its power to establish another body. Of course, this exercise, which would have to be by statute, would be subject to the President's veto. On balance, however, it seems clear that the advantages of having the Cabinet participate in an inability determination far exceed the disadvantages.

A Vice-President who has become Acting President would have the power to appoint and remove members of the Cabinet during his tenure as Acting President. If he used this power to stack the Cabinet in his favor, the President, if he had declared himself disabled, could regain his powers and duties immediately by a declaration of recovery. If he had been declared disabled by the Vice-President and Cabinet, he could declare himself able and, assuming he is challenged by the Vice-President and Cabinet within four days, get Congress to pass on the issue. Congress certainly would not look favorably on a Vice-President who had acted in an irresponsible manner. It should also be pointed out that Congress could eliminate the Cabinet as the body to participate in an inability determination. The legislative history of the "other body" provision clearly shows that, when Congress designates another body, that body replaces the Cabinet. See, e.g., 111 Cong. Rec. 7670 (daily ed. April 13, 1965) (remarks of Representative Celler); Hearings Before the House Committee on the Judiciary, 89th Cong., 1st Sess., ser. 1, at 84-85, 93 (1965); Hearings on S.J. Res. 1, 6, 15, 25 & 28, *supra* note 133, at 97-98. Congress could not replace the Vice-President. 111 Cong. Rec. 14830, 14835 (daily ed. June 30, 1965) (remarks of Senator Bayh). See also pp. 194-95 *supra*.

Constitution.¹⁵⁷ The nature of the subject dictates that this be done with all due speed.

APPENDIX A

(S.J. Res. 1 & H.R.J. Res. 1 as introduced in January, 1965 (same as S.J. Res. 139 as passed Senate in September, 1964))

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

Sec. 3. If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

Sec. 4. If the President does not so declare, and the Vice President with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits to the Congress his written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Sec. 5. Whenever the President transmits to the Congress his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the heads of the executive departments or such other body as Congress may by law provide, transmits within two days to the Congress his written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall ["will" in S.J. Res. 1] immediately decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.

APPENDIX B

(S.J. Res. 1 as passed Senate on February 19, 1965)

Section 1. Same as above.

Sec. 2. Same as above.

Sec. 3. *Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration that he is*

157. As of this writing, the proposed amendment has been ratified by Wisconsin, Nebraska, Oklahoma, Pennsylvania, Massachusetts, Arizona, Michigan, Kentucky, California, Indiana, Arkansas, New Jersey, and Delaware. The Colorado legislature refused to ratify the measure at a special session in July 1965 called to consider emergency flood legislation. Colorado is expected to ratify the measure at its next legislative session. Since a number of state legislatures will not be meeting in 1966, the proposed amendment is not likely to be ratified by the necessary thirty-eight state legislatures until early 1967. It is to be noted that the proposed amendment, as did the eighteenth, twentieth, twenty-first, twenty-second, twenty-third and twenty-fourth, specifies a seven year time limit for ratification.

unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President.

Sec. 4. *Whenever the Vice President, and a majority of the principal officers of the executive departments or such other body as Congress may by law provide, transmit to the President of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.*

Sec. 5. *Whenever the President transmits to the President of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President, with the written concurrence of a majority of the principal officers of the executive departments or such other body as Congress may by law provide, transmits within seven days to the President of the Senate and the Speaker of the House of Representatives their written declaration that the president is unable to discharge the powers and duties of his office. Thereupon Congress shall immediately proceed to decide the issue. If the Congress determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.*

APPENDIX C

(H.R.J. Res. 1 as passed House of Representatives on April 13, 1965)

Section 1. Same as above.

Sec. 2. Same as above.

Sec. 3. *Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.*

Sec. 4. *Whenever the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.*

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, transmit within two days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within ten days after the receipt of the written declara-

tion of the Vice President and a majority of the principal officers of the executive departments, or such other body as Congress may by law provide, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of the office, the Vice President shall continue to discharge the same as Acting President; otherwise the President shall resume the powers and duties of his office.*

* The italicized words represent the changes made in the basic proposal (appendix A) in the Senate (appendix B), and in the House of Representatives (appendix C).

VICE PRESIDENTIAL SUCCESSION: A CRITICISM OF THE BAYH-CELLAR PLAN

GEORGE D. HAIMBAUGH, JR.*

A. Introduction

Section 2: Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.¹

The above provision for vice presidential succession is contained in a proposed amendment to the United States Constitution which is being sponsored in the Congress by Senator Birch Bayh, Jr., of Indiana and Representative Emanuel Celler of New York. It is argued that this constitutional change is urgently needed, that the presidential initiative is necessary to insure continuity of executive policy, and that the requirement of congressional ratification will secure a proper voice to the representatives of the people. This article seeks to demonstrate the unreality of these arguments by an examination of present law, political history and traditional constitutional doctrine.

B. The Myth of Urgency

The matter of vice-presidential succession is presented by the proponents of the Bayh-Celler plan as an urgent one. There is ritual restatement of the statistics:² As a result of the resignation of one Vice President, the deaths of seven and the succession to the Presidency of eight others, the office of Vice President has been vacant on sixteen different occasions or for thirty-nine out

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1. This provision is the second section of a proposed amendment which has been introduced in the 89th Congress by Senator Bayh as Senate Joint Resolution 1 and by Representative Celler as House Joint Resolution 1. Other sections which deal with cases where the President is unable to discharge the powers and duties of his office are beyond the scope of this article. See 111 CONG. REC. 3168 (daily ed. Feb. 19, 1965).

2. See for example, "Message from the President on Succession to the Presidency and Vice Presidency, and Presidential Inability," 111 CONG. REC. 1511 (daily ed. Jan. 28, 1965); Birch Bayh, Jr., "Our Greatest National Danger," *Look*, April 7, 1964, pp. 74, 76; *Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess., on S.J. Res. 13, S.J. Res. 28, S.J. Res. 35, S.J. Res. 84, S.J. Res. 138, S.J. Res. 139, S.J. Res. 140, S.J. Res. 143, S.J. Res. 147 at 1-2, 58, 78, 95 etc., (1964) [hereinafter cited as *Hearings*].

of 176 years of national existence under the Constitution. The dangers thus conjured up, however, fade away when existing constitutional and legal provisions are recalled. Article II, section 1 of the Constitution grants Congress the power to provide by law "for the case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what officer shall then act as President. . . ." Congress exercised this authority in 1792 and since that time there has always been at least half a dozen officers in the line of succession to the Presidency. Today, the Presidential Succession Act of 1886 as amended in 1947³ fixes the order of succession, when there is no Vice President, as follows: Speaker of the House of Representatives, President pro tempore of the Senate, the Secretaries of State, Treasury, and Defense, Attorney General, Postmaster General, the Secretaries of Interior, Agriculture, Commerce, Labor and Health, Education and Welfare.⁴

Arguments in favor of the Bayh-Celler plan for vice presidential succession also include a ritual reference to the dangers of the thermonuclear age. For example, President Lyndon B. Johnson, in a recent message to Congress urging it to approve and pass on to the states the Bayh-Celler proposed amendment, called attention to the "lack of constitutional provision assuring continuity in the office of the vice president." He added that it was not necessary "to conjure up the nightmare of nuclear holocaust" to identify such an omission as a "chasm of chaos."⁵ It is true that modern weapons make possible an attack on Washington in which Congressional leaders and the Cabinet might all perish simultaneously. But provision for presidential succession in such an eventuality may be made under the present Constitution. A simple act of Congress could extend the line of succession to include officers whose work is outside Washington. In case of such a disaster, the succession could pass, for example, to the United States Ambassador to the United Nations followed by the United States Ambassador to the North Atlantic Treaty Organization and the Chief Judges of the ten numbered United States Courts of Appeals in the numerical order of the circuits in which they sit.

But in these times, the President says, such *orders* of succession are no substitute for an *office* of succession.⁶ "Can the Speaker—

3. 3 U.S.C.A. § 19 (1948).

4. See also, Amendment XX, section 4.

5. Message, *supra* note 2, at 1510.

6. *Id.* at 1511.

any Speaker," Senator Bayh asks, "possibly run the large and diverse House of Representatives and, simultaneously, prepare properly for the Presidency?"⁷ If the voters are sometimes willing to entrust the Presidency to a man who has not been Vice President—to a Senator, a NATO commander, a Governor of New York or New Jersey or a Springfield lawyer, for example, would they have such qualms about seeing the office go to a Speaker of the House of Representatives who had been attending meetings of the Cabinet and the National Security Council? Is the Vice Presidency so surely the better apprenticeship for the Presidency? John Nance Garner who held both offices described the Speakership as a "potent office regardless of who is President,"⁸ and the Vice Presidency as not being worth a "pitcher of warm spit."⁹ Other men who held or were to hold the office of Vice President have given similar descriptions of it. To Theodore Roosevelt, the vice presidency was a burial,¹⁰ to Thomas R. Marshall it was a cataleptic state,¹¹ to Alben Barkley four years of enforced silence¹² and to Hubert Humphrey a job "in which you stand around waiting for someone to catch cold."¹³ And John C. Calhoun's resignation from the Vice Presidency to become a Senator was, of course, an action that spoke louder than words.

But since the order of succession was prescribed in 1947, President Johnson has told Congress, "the office of the Vice-Presidency has undergone the most significant transformation in history. . . . Once only an appendage, the office of Vice President is an integral part of the chain of command and its occupancy on a fulltime basis is imperative."¹⁴ That the Vice Presidency has become a full-time "chain of command" job is belied by the months of foreign travel which both Mr. Johnson and his predecessor, Richard Nixon, accomplished while holding that office. Lyndon Johnson, for example, made numerous trips

7. *Hearings*, *supra* note 2, at 2.

8. BASCOM N. TIMMONS, *GARNER OF TEXAS* 168 (1948).

9. THEODORE WHITE, *THE MAKING OF THE PRESIDENT* 211 (1961).

10. Bayh, *op. cit. supra* note 2, at 74. Sen. Platt of New York referred to Roosevelt's inauguration as Vice President as T.R.'s taking the veil.

11. DWIGHT MACDONALD, *HENRY WALLACE: THE MAN AND THE MYTH* 63 (1948). "The Vice-President of the United States," Tom Marshall once observed, "is like a man in a cataleptic state: he cannot speak; he cannot move; he suffers no pain; and yet he is perfectly conscious of everything that is going on about him." *Ibid.*

12. Bayh, *op. cit. supra* note 2, at 74.

13. *TIME*, September 4, 1964, p. 21.

14. Message, *supra* note 2, at 1511.

abroad traveling in thirty-three countries on five continents during the less than three years that he was Vice President.¹⁵ While the subject of vice presidential succession was being considered in 1964 by the Senate Judiciary Committee's Subcommittee on Constitutional Amendments, the following perceptive view of the proper place of the Vice President in our constitutional system was presented by the Pulitzer Prize winning historian, Sydney Hyman:

I know, for example, that a Vice President now sits on the National Security Council, in the Cabinet, presides over both in the absence of the President, and takes good will trips. But to say all of this is to say nothing intelligible. A chair also sits. A metronome also presides. A bird also takes good will trips.

The real test of what has happened to the Vice Presidency is to ask whether the Vice President who sits, presides, takes trips, or even is put in charge of an executive commission or agency, is in a position to make the yes or no decision in any great matter of State, without leave of the President.

The simple truth is that no Vice President, not Mr. Nixon, nor Mr. Johnson in his time, has been able to do that, or would even dare to do that. Nor should he ever be permitted to, in any manner except in a clear case covered by any Presidential disability laws that have yet to be framed.

. . . .

The Vice President, in our system of government, is, and should remain the equivalent of England's constitutional Monarch. Apart from the functions specifically vested in him as the President of the Senate, the only additional rights he is entitled to, is the right to warn the President, to inform the President, to be informed by the President—all of which comes down to nothing more than the rights of consultation.¹⁶

15. MOONEY, *THE LYNDON JOHNSON STORY* 165-170 (1964).

16. *Hearings, supra* note 2, at 181. Mr. Hyman is the author of "THE AMERICAN PRESIDENT, BECKONING FRONTIERS, and ROOSEVELT AND HOPKINS." See also the statement of Clinton Rossiter, Professor of American Institutions, Cornell University, at p. 228 in which he pointed out to Senator Bayh that the jobs that a Vice President can perform are "jobs that don't have to be done as we are demonstrating at the moment when we don't have a Vice President of the United States."

C. Continuity or Victory?

The President must have a voice in the selection of a Vice President . . . It would assure a reasonable continuity of Executive policy, should the Vice President become President.

And it is in keeping with the tradition whereby a party's presidential candidate generally has great influence and, at the very least, a veto concerning his vice presidential running mate.—Senator Birch Bayh, Jr.¹⁷

The above testimony of Senator Birch Bayh of Indiana before the Subcommittee on Constitutional Amendments of which he is chairman, is a typical statement of one of the principal arguments on behalf of the Bayh-Celler plan for vice presidential succession. Thus the constitutional power of initiative in the filling of a vacancy in the office of Vice President is being sought for the President on the gratuitous assumption that he will use such power for the purpose of assuring continuity of his policies in the event that he, the President, should die, become disabled or be impeached and removed from office. It would seem that the Senator's apparent desire to follow the traditions of national political conventions would prompt him to leave the nominating initiative with the Congress since the candidate's customary "great influence" is exerted at the convention without any formal—much less constitutional—authority. There is, in fact, such aptness to his convention analogy that a review of the history of Twentieth Century national political conventions at which successful tickets have been chosen would seem to be in order. The inquiry with regard to each such convention will be: Was the candidate for Vice President picked for the purpose of insuring continuity of the policies of the presidential nominee should the latter not serve out his term, or was he selected in order to strengthen the ticket?

1900—Theodore Roosevelt, wrote Hanna biographer Thomas Beer, was forced on the Administration by Finance and Westerners. Although President McKinley felt little political affinity with the New York Governor, he prudently accepted him as a running-mate so as not to offend either the Westerners who

17. *Hearings, supra* note 2, at 4. The "continuity" argument was made by many who testified at the committee hearings as well as by several participants in the Senate debate. See 111 CONG. REC., February 19, 1965, especially the remarks of Sen. Ervin at p. 3173 and of Sen. Fong at p. 3180.

wanted the Rough Rider on the ticket or the Wall Streeters who sought thus to unseat him in Albany.¹⁸

1904—Charles Warren Fairbank's place on the Republican national ticket of that year is generally ascribed to a conservatism which balanced Roosevelt's progressivism and to residence in Indiana, a state the chronically doubtful political nature of which had made it "the home of vice presidents."¹⁹

1908—The selection of Congressman James Schoolcraft Sherman of New York state brought personal and private disappointment to William Howard Taft who would have preferred to run with "some westerner who has shown himself conservative and at the same time represents the progressive movement."²⁰ The ticket was deemed to be well balanced, however, with the addition of Sherman whose nomination was described by Alice Roosevelt Longworth in her reminiscences of that Chicago convention as "a bone allowed the reactionaries."²¹

1912—In Baltimore the Democrats nominated Governor Thomas Riley Marshall of Indiana whose progressivism was more

18. THOMAS BEER, HANNA 223-228 (1929); Frederic Logan Paxson, "Theodore Roosevelt," XIV DICTIONARY OF AMERICAN BIOGRAPHY 137 (1935); HAROLD L. ICKES, THE AUTOBIOGRAPHY OF A CURMUDGEON 43-47 (1943); THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 332-333 (1913).

19. John D. Hicks, "Charles W. Fairbanks," VI DICTIONARY OF AMERICAN BIOGRAPHY 248 (1931); 9 ENCYCLOPEDIA BRITANNICA 35 (1963); CLAUDE G. BOWERS, BEVERIDGE AND THE PROGRESSIVE ERA 210 (1932). Other Hoosiers nominated for the Vice Presidency were George W. Julian who ran on the Free Soil Party ticket with John P. Hale in 1852, Schuyler Colfax with Ulysses S. Grant in 1868, Thomas A. Hendricks with Samuel Tilden in 1876, William H. English with Winfield Scott Hancock in 1880 and with Grover Cleveland in 1884, and Thomas R. Marshall with Woodrow Wilson in 1912 and 1916. The Republican ticket was headed by Benjamin Harrison, an Indianian, in 1888 and 1892 and by Wendell Willkie, a native Hoosier, in 1940.

On the opening day of the Republican National Convention in Chicago, correspondent Louis Brownlow telegraphed his paper, the *Nashville Banner*:

"The choice of a candidate for Vice-President—the only thing graciously left to the delegates by the imperious and imperial Roosevelt—is not of enough importance to stir emotions and when questions are asked the reply is generally, 'Fairbanks, I suppose—if he will have it.'"

This passage is quoted in Brownlow's autobiography, *A PASSION FOR POLITICS*, volume I, 357 (1958).

20. HENRY F. PRINGLE, I THE LIFE AND TIMES OF WILLIAM HOWARD TAFT 354-5 (1939).

21. ALICE ROOSEVELT LONGWORTH, CROWDED HOURS 151 (1933). See also J. HAMPTON MOORE, ROOSEVELT AND THE OLD GUARD, 217 (1925); Edward Conrad Smith "James Schoolcraft Sherman," XVII DICTIONARY OF AMERICAN BIOGRAPHY 83 (1936).

like Taft's than Wilson's.²² A Wilson biographer tells how it happened:

[Burleson] telephoned Wilson that Underwood had refused the nomination and that the convention was leaning toward Thomas R. Marshall. "But, Burleson," Wilson protested, "he is a very small caliber man." Burleson agreed, but argued that since Marshall was from the Midwest and from a doubtful state, his candidacy would supplement Wilson's. "All right, go ahead," Wilson agreed. He did not know that McCombs had traded the vice-presidential nomination to Indiana in return for her votes! McCombs accordingly delivered the nomination to Marshall.²³

1916—Incumbents re-nominated and re-elected.

1920—Governor Calvin Coolidge of Massachusetts was nominated at Chicago when it became obvious that the Senate leaders who had planned and won the nomination of Warren G. Harding intended to have their way with regard to the vice presidential nomination too. "Then," in the words of a Kansas delegate William Allen White, "the revolt of the mob came quickly and with amazing directness The Convention leaders were appalled but powerless. The thing came out of the air like lightning. The resulting ballot gave 674 for Coolidge with the Convention bosses able to assemble only 146 for Lenroot."²⁴

1924—President Coolidge wanted to share the ticket with Borah of Idaho but the party leaders gave him Dawes of Illinois.²⁵ William Allen White described it this way:

Charles G. Dawes was nominated by Congressional leaders, the men who nominated Harding. It is interesting to note

22. An OUTLOOK report on the Democratic nominees stated that Marshall's "attitude toward governmental powers, the authority of the Executive, the relation of the courts to the people, the direct primary and the like, has been expressed in terms similar to those used by President Taft; in other words his "Progressivism" is of the cautious sort." THE OUTLOOK, July 13, 1912, p. 559; see also pp. 522-3 and 558 of the same issue. After his nomination, Marshall described himself as a "Progressive with the brakes on." THE LITERARY DIGEST, July 13, 1912, p. 45.

23. ARTHUR S. LINK, WILSON: ROAD TO THE WHITE HOUSE 462-3 (1947). See also Mary H. Drout, "Thomas R. Marshall," THE INDEPENDENT, July 11, 1912, p. 79.

24. WILLIAM ALLEN WHITE, A PURITAN IN BABYLON: THE STORY OF CALVIN COOLIDGE 214 (1938). See also Allen Nevins, "Calvin Coolidge," XXI DICTIONARY OF AMERICAN BIOGRAPHY 195 (1944); EDWARD ELWELL WHITING, PRESIDENT COOLIDGE A CONTEMPORARY ESTIMATE 173-180 (1923).

25. WASHINGTON MERRY-GO-ROUND (published anonymously) 255 (1931).

that when a majority in a Republican convention, or at least when amalgamated minorities, have nominated a Presidential candidate, almost invariably they have turned the nomination of Vice President over to some unexpected and often unorganized minority. It is the way of politics.²⁶

1928—The choice of Senator Charles Curtis of Kansas was a move to dissipate farm discontent which had been engendered by the nomination for the Presidency of Secretary of Commerce Herbert Hoover, a member of the Coolidge administration which had successfully opposed the McNary-Haugen farm parity bill.²⁷ Also, in the words of Senator Walter Edge of New Jersey, a Hoover delegate at the Kansas City convention, "Curtis was selected because he was very 'regular' in his party affiliation and was thereby supposed to offset any disadvantages arising from Hoover's 'irregularity.'"²⁸

1932—The naming at Chicago of Speaker of the House of Representatives John Nance Garner is described in the political recollections of James A. Farley, the Roosevelt field marshal:

Pat Harrison called Rayburn at my request I said we needed the Lone Star State to win; that the alternative was a victory-sapping deadlock, and that we could swing the vice-presidential nomination to Garner . . . Sam merely said, "We'll see what can be done." That was good enough for me. . .²⁹

1936—Incumbents renominated and re-elected.

1940—The President's surprising³⁰ insistence on having Secretary of Agriculture Henry Agard Wallace of Iowa, "a pure

26. WHITE, *op. cit.* *supra* note 24, at 305.

27. LITERARY DIGEST, June 23, 1928, p. 3-4; TIME, June 18, 1928, p. 9 and June 25, 1928, p. 10, 14-15. See also JOSEPH W. MARTIN, JR., MY FIRST FIFTY YEARS IN POLITICS 147-8 (1960).

28. WALTER E. EDGE, A JERSEYMAN'S JOURNAL 145 (1948). Edge added, "I had felt . . . that Hoover's record would attract many independent voters, and I was amused as I recalled the occasion when President-elect Harding had asked my advice on naming Hoover to a Cabinet post. Within eight years, we had definitely made Hoover a Republican."

29. JAMES A. FARLEY, JIM FARLEY'S STORY: THE ROOSEVELT YEARS 23 (1948). See also BASCOM N. TIMMONS, GARNER OF TEXAS: A PERSONAL HISTORY 159-168 (1948); JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX 134-138 (1956); FRANK GRAHAM, AL SMITH: AMERICAN, 217 (1945); EDWARD J. FLYNN, YOU'RE THE BOSS 104-5 (1947); ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT: THE CRISIS OF THE OLD ORDER 304-311 (1957).

30. JAMES MACGREGOR BURNS, ROOSEVELT: THE LION AND THE FOX 428 (1956). "Until now he had not announced his choice, partly because he had

liberal,"³¹ named as his running-mate in Chicago in mid-July may be best understood in the light of two events of the preceding month—namely, the fall of France and the nomination in Philadelphia of Wendell Willkie and Charles McNary by the Republicans who thus presented their most liberal ticket in many years.³² Citing the war in Europe in justification of his disregard of the no-third-term tradition, Roosevelt planned to hold himself above the campaign and, as Commander-in-Chief,³³ to occupy himself with re-armament and production. Wallace was expected to appeal to labor³⁴ and to help the ticket in the isolationist farm belt.³⁵

hoped that Hull would accept, partly because his own draft movement was stronger the longer he held the vice-presidential prize open as bait. The night of his nomination Roosevelt began notifying Hopkins and other party leaders that his choice was Wallace." *Ibid.* See also SAMUEL I. ROSENMAN, *WORKING WITH ROOSEVELT* 212-3 (1952): "That evening [the night of his nomination, July 17, 1940], for the first time, the President definitely stated that he favored Wallace."

31. Term used by Roosevelt in a letter sent to George Norris in July 1940. See REXFORD G. TUGWELL, *THE DEMOCRATIC ROOSEVELT: A BIOGRAPHY OF FRANKLIN D. ROOSEVELT* 533 (1957).

32. Frances Perkins wrote, "Wendell Willkie, I think, was more disturbing to Roosevelt as a rival than anyone who ran against him." He recognized that the elements which forced Willkie's nomination were not old-line Republicans but people with some progressive ideas, who, under other circumstances, might have been converted to the Roosevelt cause." FRANCES PERKINS, *THE ROOSEVELT I KNEW* 116 (1946). In the months preceding Willkie's unexpected death, Roosevelt had been in touch with him concerning the possibility of forming a new "liberal" party. Judge Rosenman describes the part he played in the negotiations in his book *WORKING WITH ROOSEVELT* in Chapter XXIV; See also BURNS, *op. cit. supra* note 30, at 466-70; TIMMONS, JESSIE H. JONES 276 (1956); and GRACE TULLY, *F.D.R. MY BOSS* 279 (1949).

33. In his acceptance speech, Roosevelt said, "Lying awake, as I have, on many nights, I have asked myself whether I have the right, as Commander in Chief of the Army and Navy, to call on men and women to serve their country or train themselves to serve, and, at the same time, decline to serve my country in my own capacity, if I am called upon to do so by the people of my country." See, JAMES F. BYRNES, *ALL IN ONE LIFETIME* 118 (1958). And see TUGWELL, *op. cit. supra* note 31, at 534: "Speaking in political terms, Franklin had now the most satisfactory enemy of all his career [i.e. Hitler]. Very early in the campaign he made a "non-political" appearance at the Norfolk Navy Yard in company with Secretary Knox. He was, it could be inferred, appearing as Commander-in-Chief of the armed forces. What civilian competitor could match that position?"

34. BURNS, *op. cit. supra* note 30, at 428; BYRNES, *op. cit. supra* note 33, at 124: "...the President told me that Hopkins had been conferring with labor leaders, especially Philip Murray of the CIO and William Green of the AF of L, and had reported that they all favored Wallace's nomination for Vice President."

35. BURNS, *op. cit. supra* note 30, at 428. "[Wallace] would appeal in the farm states, where isolationist feeling was strong." *Ibid.* BYRNES, *op. cit. supra* note 33, at 124; FARLEY, *op. cit. supra* note 29, at 294; FLYNN, *op. cit. supra* note 29, at 157: "He had been a good administrator of the Department of Agriculture and had brought to the President a certain strength among the farmers. This was important in 1940, because, by that time, the President was

1944—"Franklin must have figured," Rexford Tugwell has written, "that more was to be gained than lost when Truman was substituted for Wallace . . . His [Roosevelt's] approach to politics had always been strategic."³⁶

1948—Senator Alben Barkley was nominated at Philadelphia after four Southern states had walked out over the adoption of a civil rights plank stronger than that recommended by the majority of the platform committee. "The Senator," a national news magazine reported, "has been delicately treading a tight rope on the civil-rights question. As Democratic leader of the Senate, he could not oppose the President's program. As a Kentuckian, well liked in the South, he could not conveniently endorse it. So he said nothing. That left him "available" as a man both the New Dealers and much of the south could support."³⁷

1952—California Senator Richard M. Nixon's youth, familiarity with domestic issues and Republican Party regularity com-

beginning to lose his popularity in the country districts." ROSENMAN, *op. cit. supra* note 30, at 206: "Wallace had made a good record as Secretary of Agriculture, and it was assumed that politically he would help in the farm states."

36. See FLYNN, *op. cit. supra* note 29, at 180: "The President asked me to make certain inquiries. It was most important for us to hold such states as New York, Pennsylvania, Illinois, New Jersey, and California. In the trip I made over the country I formed the opinion that we would not carry those states if we nominated Wallace, notwithstanding the fact that the PAC was very strong in those states and was favorable to Wallace. . . . In a subsequent meeting with the President I told him of my conclusion that Wallace would be a serious handicap to him on the ticket. The problem was to find a man who would hurt him the least . . . We went over every man in the Senate to see who would be available, and Truman was the only one who fitted." See also GEORGE E. ALLEN, Chapter 10 ("The Conspiracy of the Pure in Heart"), *PRESIDENTS WHO HAVE KNOWN ME* 118-136 (1950); BYRNES, *op. cit. supra* note 33, Chapter 13 ("Clear It with Sidney") at 216-237; and ROSENMAN, *op. cit. supra* note 30, at 440-452 in which Judge Rosenman tells how he was dispatched by the President to tell Vice President Wallace "that I'd like to have him as my running mate, but I simply cannot risk creating a permanent split in the party by making the same kind of fight for him that I did at the convention four years ago."

During the Democratic National Convention in Chicago National Chairman Robert Hannegan made public a letter which he had received from the President and which read as follows:

Dear Bob:

You have written me about Harry Truman and Bill Douglas. I should of course, be very glad to run with either of them and believe that either one of them would bring real strength to the ticket.

Always sincerely,
Franklin Roosevelt

37. U.S. NEWS & WORLD REPORT, July 23, 1948, p. 42-3. See HARRY S. TRUMAN, *MEMOIRS: YEARS OF TRIAL AND HOPE* 191 (1956): "I had long respected him as one of the ablest debaters on the floor of the Senate. He was a hard-working, honest politician and one of the most popular men in the Democratic party. As a thoroughly acceptable candidate to the South, Barkley made an ideal partner to run with me in 1948."

plemented General Eisenhower's age, international experience and high service under two Democratic Presidents. But, more importantly, Nixon was "regarded as an ideal 'bridge' between the seriously divided Eisenhower and Taft wings of the party."³⁸

1956—Incumbents re-nominated and re-elected.

1960—Senator Lyndon B. Johnson of Texas was, in the words of Richard Nixon, "the best available bridge for Kennedy between the Northern liberals and the Southern conservatives."³⁹

1964—Senator Hubert Humphrey of Minnesota was described in the *Time* coverage of the Atlantic City Democratic convention as one who would "balance the ticket almost to perfection—Northern Hubert with his pure liberalism and appeal to labor, along with Southwesterner Lyndon with his more conservative bent and appeal to the business community."⁴⁰

A survey of the selection of men for the second place on winning national tickets during this century should thus suffice to demonstrate that the influence which a presidential candidate is able to bring to bear on the selection of his running mate is used basically not in the interest of continuity of policy but in the interest of victory at the polls. And when it is remembered that in this century every President who has survived his first term

38. EARL MAZO, *RICHARD NIXON: A POLITICAL AND PERSONAL PORTRAIT* 92 (1959). See also *U.S. NEWS & WORLD REPORT*, July 18, 1952, p. 36; SHERMAN ADAMS, *FIRST HAND REPORT* 34-36 (1961); MERLO J. PUSEY, *EISENHOWER: THE PRESIDENT* 23 (1956); MAZO, *op. cit. supra* at 89.

39. RICHARD M. NIXON, *SIX CRISES* 313 (1962). Conf., *NEWSWEEK*, July 25, 1960, p. 21: "As one of its own, Johnson could save the South for the Democrats by calming fears over civil rights and any furor over Kennedy's Catholicism. As it looks now the ticket should keep the South." See also BOOTH MOONEY, *THE LYNDON JOHNSON STORY* 159 (1964): "[Kennedy] could count electoral votes as well as anyone else, better than most, and his count showed him that he needed assurance that he could carry the South in the November election..." And see THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT* 208 (1961) in which White relates how Kennedy, on the morning after his nomination in Los Angeles, arranged to meet Lyndon Johnson and how press secretary Salinger and tactician Kenneth O'Donnell were then "put to work on the simple arithmetic of electoral votes: add the votes of New England to the votes of the Solid South, and how many more would be needed to carry the election?"

40. *TIME*, September 4, 1964, p. 21. Similarly, *NEWSWEEK*, September 7, 1964, p. 19, lists the contents of Humphrey's "kit bag of ticket-balancing credentials: a Northern address, a liberal reputation, an intellectual bent, special popularity in the possibly critical Middle West." And see *U.S. NEWS & WORLD REPORT*, March 23, 1964, p. 43-44. The *NEWSWEEK* story also reported the following at p. 19: "I don't know what all the fuss is about," the President [Johnson] told staffer Kenneth O'Donnell at the crest of the wave of Vice Presidential dope stories. 'I ain't gonna die in office.' . . . John Kennedy had told the same thing to the same staffer at almost the same point in time four years ago."

has been a candidate for re-election, it is reasonable to expect that if a Vice President-just-become-President is empowered to nominate a new Vice President, his motivations will not differ from those of a presidential candidate and that he too will be thinking in terms of a ticket-strengthening running-mate. The argument that the President must have the initiative in a procedure for mid-term vice presidential succession in order that he can insure the continuity of his executive policies is a fallacy for the simple reason that such a power would not be used for such a purpose.

D. Congressional Abnegation

. . . Congress is a body entrusted with making fateful decisions at crucial times. It is Congress that declares war on behalf of us all. The Congress may elect or remove Presidents in certain circumstances. Certainly, the Congress is the proper body—with its hand on the pulse of public opinion—to elect a Vice President upon the nomination of a President.—Senator Birch Bayh, Jr.⁴¹

The above apostrophe to the importance of Congress is the seductive flattery which precedes the kiss of death. Although the confirmation power of Congress is played up, it is the nominating role of the President that almost certainly would be the dominant one. Congress is being asked to transmit to the states the proposal of a highly unusual constitutional doctrine which, if ratified by them, would transfer to the President most of Congress' say in the matter of vice presidential succession.

The Bayh-Celler plan's provision for nomination by the President would wipe out the reform effected at the instigation of President Harry S. Truman by the Presidential Succession Act of 1947⁴² which replaced the Secretary of State with the Speaker of the House as first in the line of succession to the Presidency in the event of vacancies in both that office and the vice presidency. President Truman believed that this arrangement would be a more democratic one because, whereas the Secretary of State is nominated by the President, the Speaker is elected to Congress by the people of his district and to the Speakership by the biennially elected representatives of the people of each of the Con-

41. *Hearings, supra* note 2, at 4.

42. 3 U.S.C.A. § 19 (1948).

gressional districts.⁴³ The theory that the initiative in the selection of the next-in-line to the Presidency should remain with the representatives of the people was eloquently stated with reference to the convention process by Adlai Stevenson. Addressing the Democratic National Convention of 1956, he said:

. . . the selection of the Vice Presidential nominee should be made through the free processes of this convention so that the Democratic Party's candidate for this office may join me before the nation—not as one man's selection—but as one chosen by our great party, even as I have been chosen. . . . The choice will be yours. The profit will be the nations.^{43a}

The Bayh-Celler plan's provision for nomination by the President would be a break not only with the spirit of the Truman plan but contrary to the constitutional doctrine almost universally observed among representative governments. In parliamentary regimes which account for the largest number of governments throughout the world, initiative for the selection of a prime minister's successor lies generally with members of the lower chamber. In presidential regimes there may or may not be constitutional provision for a vice president but presidents are not granted constitutional power to nominate an officer who is their next in line of succession. Even in the presidential regimes of French-speaking black Africa—Ivory Coast, Dahomey, Niger, Guinea, Mauritania, Togo and the Central African Republic—which changed constitutions in 1960 in favor of their own versions of Gaullist *presidentialisme* for the purpose of granting a preponderance of governmental power to the executive, presidents are not given the constitutional power to nominate their potential successors.⁴⁴

43. *Hearings, supra* note 2, at 58, 257.

43a. The *New York Times*, August 17, 1956, p. 7. Attention is also called to the view of another Democratic standard bearer. In a well publicized letter to Senator Samuel Jackson of Indiana, permanent Chairman of the Democratic National Convention of 1944, President Franklin D. Roosevelt (after damning Vice President Wallace with faint praise and announcing that, if he were a delegate, he would vote for Wallace for Vice President) wrote "...I do not wish to appear in any way as dictating to the convention. Obviously the convention must do the deciding. And it should—and I am sure it will—give great consideration to the pros and cons of its choice." ROSENMAN, *op. cit. supra* note 30, at 449.

44. DMITRI G. LAVROFF, *LES CONSTITUTIONS AFRICAINES, L'AFRIQUE NOIRE FRANCOPHONE ET MADAGASCAR* 23-29 (Paris, 1961), and J. Y. BRINTON, *CONSTITUTIONS OF THE NEW AFRICAN STATES: A CRITICAL STUDY* 84-86 (Alexandria, 1962).

The Bayh-Celler plan for vice presidential succession was formulated in the face of repeated predictions that to place the nominating initiative in the hands of the President would be virtually to grant him the power to appoint a Vice President. For example:

Senator Birch Bayh of Indiana. I have more faith in the Congress acting in an emergency in the white heat of publicity, with the American people looking on. The last thing Congress would dare to do would be to become involved in a purely political move.

Senator Ross Bass of Tennessee. The election of the President is just as political as anything can be, under our American system . . . Under our system, it must be that way.⁴⁵

Senator Frank Church of Idaho. This [the mere role of ratification] is frequently the role assigned to a legislative body in a country where legislatures do not really have important powers. I cannot conceive of a situation, though one might possibly occur, it is hard to conceive of a situation where the Congress would not almost automatically ratify a Presidential choice, for to do otherwise would be to repudiate a President who has just assumed office . . . Therefore, if the role assigned to the Congress is merely that of ratification, we give to it nothing more than a formality in the kind of situation that you and I could foresee. It is difficult to foresee a situation where this would be otherwise.⁴⁶

Senator A. S. Mike Monroney of Oklahoma. I question one bit of philosophy in the selection of the successor by the

Among the more traditional, tri-partite, check-and-balance presidential systems of the American continents, some countries not only deny a President the formal authority to nominate a successor but have also acted to prevent activity to that end on his part in favor of his close relatives or in-laws. This is accomplished by making such members of the family of an incumbent President ineligible to hold the offices of President (in Bolivia, Costa Rica, Honduras, Peru, El Salvador and Nicaragua) and Vice President (in Bolivia, Costa Rica, Honduras, and Peru). In 1923 the United States announced its "most hearty accord" with the Central American Treaty signed that year in Washington which prohibited the recognition of revolutionary governments which might come to power in Costa Rica, El Salvador, Guatamala, Honduras or Nicaragua or the elected successors to such regimes if headed by an "ascendant, descendant or brother" of one of the leaders of the predecessor revolutionary regime. 1 HACKWORTH'S DIGEST OF INTERNATIONAL LAW 188-190 (1940).

45. 111 CONG. REC. 3193 (daily ed. Feb. 19, 1965).

46. *Hearings*, *supra* note 2, at 81.

nomination of one man, placing in the Supreme line of authority over 180 million Americans one man chosen absolutely by the President by sending the nomination to Congress, and saying, "This is my man. I choose him for my successor."

I feel that this was one of the reasons why Congress wanted to get away from the Cabinet members in designating the line of succession; and get away from having the President or the Vice President choose his successor.⁴⁷

Senator Jacob K. Javits of New York. [W]ith the initiative placed with the President, the Congress would undoubtedly be reluctant in such a crisis to exercise more than the most perfunctory consent process. This would amount to no more than appointment by the President of his successor, the very reason on which President Truman based his request for the 1947 change in the then-existing succession law, under which the Secretary of State appointed by the President would have been the successor.⁴⁸

Senator Kenneth B. Keating of New York. If, as is likely, the President has just assumed office as a former Vice President succeeding a deceased President, congressional confirmation is likely to be meaningless at best and divisive at worst. Meaningless, if the country is in its usual mood of rallying behind the new President, and giving him his way during more or less of a "honeymoon" period, in which case confirmation would be expected as a matter of rote. Or divisive, if the presidential nomination of a potential successor is looked upon by his opposition as an opportunity to make real trouble from the start.⁴⁹

Richard M. Nixon, former Vice President of the United States. Now when a President dies, I would say that the feeling in the country, the immense emotional impact at the death of a President, certainly by assassination and even by normal causes, is such that his successor would probably get broad support even from an opposition Congress.⁵⁰

James C. Kirby, Jr., Associate Professor of Law, Vanderbilt University. If it [Congress] rejected a succession of nom-

47. 110 CONG. REC. 22277 (daily ed. Sept. 28, 1964).

48. *Hearings*, *supra* note 2, at 53.

49. *Hearings*, *id.*, at 28-29.

50. *Hearings*, *id.*, at 249.

inees, it would soon be apparent to an outraged public that individual Members of this congressional majority party were obstructing efficient government by causing a continuation of the vacancy in the Vice Presidency. We could depend upon public opinion to correct this.⁵¹

Clinton Rossiter, Professor of American Institutions, Cornell University. I am assuming for this point that politics, petty politics would be pretty well laid aside but in addition remember that the onus then is placed on the Congress, they can confirm under the system that you and I have agreed on, the President's nomination, but they can't then reject and then put someone else in.

Senator Bayh. There would be—

Mr. Rossiter. Simply the vacancy would continue and the burden would be on Congress for continuing this vacancy, do you see what I mean?⁵²

Lest we forget the nature of the "intense emotional impact" deriving from the potent compound of one President's funeral and his successor's political honeymoon, the following late November 1963 items are presented from a leading newspaper on each coast:

(1) From Herb Caen's columns in the *San Francisco Chronicle*:

BLACK FRIDAY

. . . And so you cried . . . You cried for every stupid joke you had ever listened to about him, and you cried for the fatuous faces of the people who had told them. You cried for the Nation, and the despoilers of it, for the haters and the witch-hunters, the violent, the misbegotten, the deluded. You cried because all the people around you were crying, in their impotence, their frustration, their blind grief.—November 24, 1963.

THE LONGEST WEEKEND

. . . Gray Skies, and the constant gray and black of the TV screen. For the first time, in these unprecedented hours, there was Total Television. You were irresistibly drawn to

51. *Hearings, id.*, at 42.

52. *Hearings, id.*, at 226.

the screen . . . You were immersed in a fantasy world of honor guards standing at attention in the rain . . . For hour after hour, through the marvel of electronics, we saw the President as though for the first time. His life, compressed onto the small screen, passed before our eyes, and we marveled at his spirit, his warmth, his humor, his brilliance . . . We drew strength from him . . . But the lump in the throat refused to be drowned.—November 25, 1963.

LET US BEGIN

. . . On Friday the Bingo game went on as usual in a local church, and a woman enthused to her best friend the next morning, "I won \$25.00." Her friend replied, "I never want to speak to you again."

. . . It will be hard to shake the memory of the four Senators discussing the new administration before the cameras Sunday, laughing inanely, cracking jokes, acting like ward politicians at the lowest level.—November 26, 1963.

(2) From the *Washington Post*

FLAGS FLYING AT HALF STAFF FOR MONTH—November 23, 1963.
PRESS STOPPED ON LASKY BOOK ABOUT KENNEDY

Victor Lasky, author of "JFK: The Man and the Myth," said, "I've cancelled out of everything. As far as I'm concerned Kennedy is no longer subject to criticism on my part." —November 23, 1965.

ONE ON THE AISLE by Richard L. Coe . . .

Yesterday's dastardly crime lay in the atmosphere, unthinking, selfish, wasteful. Around us, every day, we all have heard the talk, small and mean, which created the poisonous air . . . Will this tragedy teach us anything to expiate our meanness . . .?—November 23, 1963.

THE NATION LIVES

. . . All tributes have been tendered except that final tribute that John Fitzgerald Kennedy would have coveted most—the tribute of a people and a government going forward with the tasks he had so far advanced . . .

The people, having made their proper obeisance at catafalque and bier, at altar and temple, now must turn to the

less ceremonial reverence they can pay to a departed leader . . . in commitment to the noble purposes and ideals that were the object of John Fitzgerald Kennedy's lifelong devotion.—November 26, 1963.

TEXTS OF REMARKS GIVEN AT ROTUNDA . . .

Chief Justice Earl Warren. Is it too much to hope that the martyrdom of our beloved President might even soften the hearts of those who would themselves recoil from assassination, but who do not shrink from spreading the venom which kindles thoughts of it in others?—November 25, 1963.

MOURNERS FILL CITY'S CHURCHES TO OVERFLOWING

The Very Reverend Francis B. Sayre, Jr., Dean of the Washington Cathedral. Surely we all do repent that shallow and divisive contentiousness which bred an atmosphere in which some ignorant sharpshooter would one day execute our careless threats.

The Reverend Edward Hughes Pruden of the First Baptist Church. Those with a hand on the trigger include whoever encourages blind and irresponsible partisanship.—November 25, 1963.

At such a time do we need a weaker Congress?

E. Conclusion

The arguments that the Bayh-Celler plan for vice presidential succession is urgently needed do not seem to be justified when it is remembered that:

1) Presidential succession does not depend upon the office of Vice President being filled. Acting pursuant to Article II, section 1 of the United States Constitution, Congress first provided for presidential succession in 1792 and there are, under present legislation, twelve officers in the line of succession after the Vice President.

2) The possibility of the simultaneous death of all in the line of succession is a nuclear age reality, but the Bayh-Celler plan does not meet this danger. Under Article II Congress now has the power to extend the line of succession to include high ranking officials who work outside the Washington area.

3) The contention that the next-in-line to the Presidency must serve as Vice President because that office provides the best ap-

prenticeship for the Presidency is a dubious one in view of the fact that his activities in the executive branch cannot be of a policy-making nature lest the authority of the President be fragmentized.

The argument that the power to nominate a Vice President would be used by a President for the purpose of assuring continuity of executive policies does not square with American political history which demonstrates that a man seeking election or re-election to the Presidency wants a teammate who can strengthen the ticket with groups not too enthusiastic about the presidential nominee.

The argument that the requirement of Congressional confirmation of the President's nomination is a guarantee of an important role for the representatives of the people in the process of vice presidential succession is another weak argument. The President would, in any event, have opportunities for consultation with members of Congress. The addition of a constitutional power to nominate a Vice President would, under the circumstances of the tragic termination of one presidential administration and the honeymoon atmosphere attending the advent of another, tend to reduce the role of Congress in the matter to little more than a formality.

For these reasons it would be undesirable to have the Bayh-Celler plan for Vice Presidential succession incorporated into the Constitution of the United States.

VICE PRESIDENTIAL SUCCESSION: IN SUPPORT OF THE BAYH-CELLER PLAN

JOHN D. FEERICK*

A. Introduction

In the April, 1965, issue of the *South Carolina Law Review* there appeared an article by Professor George D. Haimbaugh, Jr., entitled "Vice Presidential Succession: A Criticism of the Bayh-Cellar [*sic*] Plan."¹ Professor Haimbaugh sought to demonstrate what he claimed was the "unreality" of certain arguments advanced in favor of the vice presidential succession feature of the proposed twenty-fifth amendment to the Constitution.² The arguments to which he addressed himself were "that this constitutional change is urgently needed, that the presidential initiative is necessary to insure continuity of executive policy, and that the requirements of congressional ratification will secure a proper voice to the representatives of the people."³

This article attempts to answer the criticisms made by Professor Haimbaugh by showing that they are invalid, inapplicable, and unrealistic.

B. The Truth of Urgency

Professor Haimbaugh states that the Vice Presidency has been vacant for thirty-nine out of 176 years of our existence under the Constitution due to the resignation of one Vice President, the death of seven and the succession of eight others.⁴ He then

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1. 17 S.C.L. REV. 315 (1965).

2. Section 2, the vice presidential succession provision, provides:

Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

The proposed amendment passed the House of Representatives by voice vote on June 30, 1965 (111 CONG. REC. 14668 (daily ed. 1965)), and the Senate by a vote of 68 to 5 on July 6, 1965 (111 CONG. REC. 15031-32 (daily ed. 1965)). The same basic measure previously had passed the Senate on February 19, 1965 by a vote of 72 to 0 (111 CONG. REC. 3203 (daily ed. 1965)), and the House on April 13, 1965, by a vote of 368 to 29 (111 CONG. REC. 7699 (daily ed. 1965)). As of this writing (December, 1965), it has been ratified by Wisconsin, Nebraska, Oklahoma, Massachusetts, Pennsylvania, Kentucky, Arizona, Michigan, Indiana, California, Arkansas, New Jersey, and Delaware.

3. 17 S.C.L. REV. 315 (1965).

4. John C. Calhoun resigned; George Clinton, Elbridge Gerry, William E. King, Henry Wilson, Thomas A. Hendricks, Garret A. Hobart, and James S. Sherman died; and John Tyler, Millard Fillmore, Andrew Johnson, Chester A. Arthur, Theodore Roosevelt, Calvin Coolidge, Harry S. Truman, and Lyndon B. Johnson succeeded.

says that the "dangers thus conjured up, however, fade away when existing constitutional and legal provisions are recalled," pointing to Congress' power to establish a line of succession and to the Succession Laws of 1792, 1886 and 1947 which were passed pursuant to this power.⁵

The existence of a line of succession beyond the Vice Presidency does not obviate the need for a Vice President in the least. Indeed, the present succession law demonstrates the need for a Vice President at all times.⁶ There are objections of both policy and law to the 1947 Act which have been completely overlooked by Professor Haimbaugh.⁷ From the standpoint of policy, the presence of the Speaker and President pro tempore, respectively, as the immediate successors after the Vice President leaves much to be desired.

First, it would permit a political party different from that of the President and Vice President to take control of the Executive in the event of the death, resignation or removal of both the President and Vice President. The possibility of a Congress dominated by a different party is by no means remote. For about eight of the thirty-seven years when there was no Vice President the immediate successor to the President was of the opposite political party. This was true for much of the time when Presidents John Tyler, Millard Fillmore and Harry S. Truman were serving out the terms of Presidents William H. Harrison, Zachary Taylor, and Franklin D. Roosevelt, respectively. During President Dwight D. Eisenhower's entire second term, Congress was controlled by the Democrats. Presidents William H. Taft, Woodrow Wilson and Herbert Hoover were confronted by Congresses controlled in one or both Houses by the opposite party.

Second, the experience of Speakers and Presidents pro tempore is almost strictly legislative in nature. Since they arrive at their positions of leadership after many years of service in Congress,

5. 17 S.C.L. REV. 315, 316 (1965).

6. The line of succession after the Vice President is as follows: Speaker of the House of Representatives, President pro tempore of the Senate, Secretary of State, Secretary of Treasury, Secretary of Defense, Attorney General, Postmaster General, Secretary of Interior, Secretary of Agriculture, Secretary of Commerce, and Secretary of Labor. 3 U.S.C. § 19 (1958).

7. Professor Haimbaugh is factually incorrect in saying that "there has always been at least half a dozen officers in the line of succession" since 1792. 17 S.C.L. REV. 315, 316 (1965). From 1792 to 1886 the line of succession beyond the Vice Presidency consisted only of the President pro tempore and the Speaker (see 1 Stat. 239 (1792)), and there were times when there was neither a President nor a Speaker. Moreover, Professor Haimbaugh errs in including the Secretary of Health, Education and Welfare in the present line of succession. This official has never been added to the line.

they are usually well on in years when they do so. Following the death of President John F. Kennedy the public clamor for a change in the present succession law and for a method of filling a vacancy in the Vice Presidency was due in large part to the ages of the Speaker, who was then seventy-one, and the President pro tempore, who was then eighty-six. There seemed to exist at the time a general feeling that considering the present day requirements of the Presidency, this law is impractical. Speakers and Presidents pro tempore are not selected for their positions with a view to possible succession to the Presidency. The same is not true of the Vice President.

From the legal standpoint, there is reason to believe that the present law is unconstitutional. First, there is real doubt as to whether the Speaker or President pro tempore is an officer of the United States. Professor Ruth C. Silva, who has studied this matter in great detail, states that "the Constitution does not contemplate the presiding legislative officers as officers of the United States" (as is required by the succession clause of the Constitution).⁸ She adds that this view is "supported by all the commentators."⁹

Second, under the 1947 law, the Speaker and President pro tempore must resign their positions and seats in Congress in order to act as President in a case of presidential inability. Many constitutional authorities maintain that Congress can attach the powers and duties of the Presidency only to an existing office, which the occupant continues to occupy while acting as President.¹⁰ The succession provision of Article II, Section 1 of the Constitution appears to support this by providing that the officer in the line of succession shall act as President "until the disability be removed, or a President shall be elected," implying that he is to retain his office while so acting.

In addition, the 1947 law provides that where a Cabinet officer acts as President, he may be superseded by a Speaker or President pro tempore. This is subject to objection because the Constitution provides that the officer appointed by Congress shall act "until the Disability [of the President or Vice President] be removed, or a President shall be elected." Therefore, the "officer"

8. Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 463 (1949).

9. *Id.* at 464. See *e.g.*, Kallenbach, *The New Presidential Succession Act*, 41 AM. POL. SCI. REV. 931, 939-41 (1947); Wilmerding, Jr., *Washington Post*, December 8, 1963, p. 1, cols. 2-3.

10. Silva, *supra* note 8, at 464-66.

acting as President should not be replaced except by the President or Vice President whose disability had ended or by a newly elected President.

Clinton Rossiter, Professor of American Institutions at Cornell University and a noted authority on the Presidency,¹¹ said in his statement to the Subcommittee on Constitutional Amendments in 1964:

I am bound to say in my opinion that the act of 1947 is a poor one, in many ways one of the poorest ever to emerge from this stately and distinguished body. I am not even sure . . . that it is a constitutional act, and sooner or later it will have to be amended, if not scrapped.¹²

He was of the view that:

The problem of succession could best be solved, except in the most ghastly and unforeseen of circumstances, by providing some dignified and conclusive means of filling the Vice-Presidency whenever it has been vacated. If we could be sure that there would always, or almost always, be a Vice President, then we would not need to worry our heads too much over the really quite unanswerable question of whether the Secretary of State or Speaker of the House would make a better President.¹³

In view of the foregoing objections, if a Speaker or President pro tempore took over the duties of the Presidency under the 1947 law, there undoubtedly would be much confusion at the

11. Professor Haimbaugh fails to give the context of the quotations he extracted from Professor Rossiter's and Sidney Hyman's testimony before the Senate Subcommittee on Constitutional Amendments. 17 S.C.L. REV. 315, 318 and n. 16 (1965). The context would show that both men were registering their objections to the proposal of having two Vice Presidents at the same time. See *Hearings before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess., on S. J. Res. 13, S. J. Res. 28, S. J. Res. 35, S. J. Res. 84, S. J. Res. 138, S. J. Res. 139, S. J. Res. 140, S. J. Res. 143, S. J. Res. 147 at 181, 228 (1964) [hereinafter cited as *Hearings*]. Rossiter, who strongly favored the adoption of a method of filling a vacancy in the Vice Presidency (see text accompanying note 13, *infra*), said about the two Vice Presidents' proposal:

[W]e have spent literally generations getting the Vice Presidency up to a place where it has real distinction, and first-class men are willing to accept it, as they certainly were not 50 or 60 years ago, and I think we ought to do everything within our power to keep it that way, and I think that to try to institute a second Vice President would get us right back to where we were before.

Hearings, supra, note 11, at 228.

12. *Hearings, supra* note 11, at 217.

13. *Id.* at 220.

time regarding his legal status, with the likelihood of challenge through the courts. Needless to say, this would not be conducive to stability when it would be most needed. On the other hand, under the proposed twenty-fifth amendment, there could not be any doubt whatever as to the legal status of the successor.

Professor Haimbaugh criticizes the view that the Vice Presidency is the "best apprenticeship" for the Presidency. He refers to the months of foreign travel spent by Vice Presidents Richard Nixon and Lyndon B. Johnson and concludes that the Vice Presidency has not become a "full-time 'chain of command' job."¹⁴

Since World War II, the United States has taken on an increasingly active role in world affairs. The recent policy of having the Vice President travel to foreign countries cannot be disassociated, as Professor Haimbaugh would have it, from the job of Vice President. This type of activity is not a waste of time but rather prepares the Vice President even more for the day when he might be called upon unexpectedly to lead the Nation. As the Nation's second officer, the Vice President, by word and deed, is in a position to improve the image of the United States abroad, and to acquaint himself with world problems by direct contact with the leaders and people of foreign countries. William White points out in his authoritative book on President Johnson that his foreign tours as Vice President

were not good-will missions or the cornerstone-laying sort of thing. They were vital trips in which Johnson went for broader purposes than to estimate and to report on nearly all the foreign crises which arose in the almost three years of his vice-presidency. Kennedy gave his Vice-President wide powers to negotiate and to act on behalf of the United States.¹⁵

It cannot be disputed that for much of our history the Vice President was an anomaly. He had few duties to perform and seldom participated in the councils of government. Yet four times in the last century and four times in this century, Vice Presidents were suddenly called upon to serve as President when the President died. Each time the Vice President led the country through the crisis occasioned by the death of the President. During this century the death of William McKinley propelled Theodore Roosevelt into the Presidency; the death of Warren

14. 17 S.C.L. REV. 315, 317 (1965).

15. WHITE, *THE PROFESSIONAL: LYNDON B. JOHNSON* 232 (1964).

Harding, Calvin Coolidge; the death of Franklin Roosevelt Harry S. Truman; and the death of John F. Kennedy, Lyndon B. Johnson. It is questionable whether any other office of succession could have provided comparable or better Presidents.

In judging the type of apprenticeship a person receives in the Vice Presidency, the present rather than the past, upon which Professor Haimbaugh places so much reliance, must be a guide. Today, the Vice President serves in the Cabinet and National Security Council. He participates in the inner councils of government in the making of the great decisions of the day. He is chairman of executive committees and overseer for the President of various government programs. He is President of the Senate, and, as such, a liaison between the Executive and Legislative Branches of Government. He represents and undertakes special assignments for the President abroad and at home. In brief, he has become a fully informed, consulted and working member of the Government.¹⁶ There is no other officer in our Government who has the same opportunity to prepare himself for possible duty as President. Certainly the Speaker of the House of Representatives, who has scores of legislative duties to perform, is not in such a position.

Professor Haimbaugh states that "the possibility of the simultaneous death of all in the line of succession is a nuclear age reality, but the Bayh-Celler plan does not meet this danger."¹⁷ This criticism is wholly unjustified, since Congress now has the power to extend the line of succession. There is no reason whatever for a constitutional amendment to deal with this matter, since it can be done by statute. There is every reason for dealing with vice presidential succession by constitutional amendment, since Congress does not now have the power to fill a vacancy in the Vice Presidency. The proposed twenty-fifth amendment meets this danger.

C. Continuity

Professor Haimbaugh says: "the argument that the power to nominate a Vice President would be used by a President for the

16. The author describes the development of the Vice Presidency in his book, *FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION* (1964). It is interesting to note that, after becoming President, Johnson asked Speaker McCormack to sit in on meetings of the National Security Council and "other key decision-making meetings" provided they were not "inconsistent with his legislative responsibilities." *N.Y. Times*, December 4, 1963, p. 24. His status as a member of Congress prevented him from receiving a Cabinet invitation.

17. 17 S.C.L. REV. 315, 332 (1965).

18. U.S. CONST. art. II, § 1, para. 6.

purpose of assuring continuity of executive policies does not square with American political history which demonstrates that a man seeking election or re-election to the Presidency wants a teammate who can strengthen the ticket with groups not too enthusiastic about the presidential nominee."¹⁹

This criticism is completely inapplicable. The proposed amendment does not deal with the selection of a running mate with a view to a forthcoming election, and there is thus no question of choosing the nominee on the basis of his ability to attract votes. The amendment, it should be stressed, deals with filling a vacancy in the Vice Presidency. Such a vacancy may result upon the happening of two sets of contingencies: (1) the death, resignation or removal of the President and the succession of the Vice President; and (2) the death, resignation or removal of the Vice President. Surely, at a time of death in office of either the President or Vice President, the President would nominate for Vice President a person of presidential timber, especially since the Nation's attention would be focused on the presidential qualifications of any nominee. There is no relevant experience to suggest the contrary.

There can be little quarrel with Professor Haimbaugh's statement that a presidential candidate "thinks in terms of a ticket-strengthening running-mate."²⁰ But, as recent history shows, he does not overlook the qualifications of his running mate to succeed to the Presidency. In recent elections only first-class men have succeeded in being elected Vice President. Professor Haimbaugh, unfortunately, omits some pertinent data in his account of recent national political conventions. Thus:

1952—In his memoirs, President Dwight D. Eisenhower says he recommended Richard M. Nixon for the Vice Presidency for these reasons:

First, through reports of qualified observers I believed that his political philosophy generally coincided with my own. Next, I realized that before the election took place I would have attained the age of sixty-two. I thought we should take the opportunity to select a vice-presidential candidate who was young, vigorous, ready to learn, and of good reputation.²¹

19. 17 S.C.L. REV. 315, 333 (1965).

20. *Id.* at 326.

21. EISENHOWER, *MANDATE FOR CHANGE: 1953-1956*, at 46 (1963).

During the campaign Eisenhower indicated to Nixon that he believed the Vice President should be trained and prepared so as to be able to "take over the presidency smoothly and efficiently should the need arise."²²

1960—In early 1960 John F. Kennedy said of Lyndon B. Johnson:

I think I am equipped for the job [of President]. Lyndon Johnson is the only other man I can think of with the equipment for the job of President.²³

Presidential candidate Richard Nixon favored Henry Cabot Lodge as his running mate

not because he was from the East and I was from the West, nor because on some domestic issues his views were more liberal than mine, but because on the all-important issues of foreign policy we were in basic agreement. I felt that his experience in the Senate and at the United Nations qualified him to lead the Free World in the event that responsibility should come to him.²⁴

1964—Time after time in the months leading up to his recommendation of a running mate, President Johnson said his criteria were: Who would serve "the best interests of the country and who would make the best President of the United States in the event he were called upon to be President?"²⁵

The death of President Roosevelt, the attempted assassination of President Truman, the heart attack and strokes sustained by President Eisenhower, and the tragic assassination of President Kennedy have made the American people readily aware of the critical need for an able successor to the President, and a presidential candidate who failed to heed this in recommending a running mate would be inviting political disaster.

D. Congressional Confirmation

Professor Haimbaugh suggests that nomination of a Vice President by the President is less democratic than the present succession law, under which the "Speaker is elected to Congress

22. Nixon, "The Second Office," in 1964 YEAR BOOK, WORLD BOOK ENCYC., at 82.

23. *Newsweek*, December 2, 1963, p. 28.

24. Nixon, *supra* note 22, at 89.

25. N.Y. Times, April 24, 1964, p. 14.

by the people of his district and to the Speakership by the biennially elected representatives of the people of each of the congressional districts.”²⁶ In giving the President the power to nominate a Vice President, the amendment is most practical and in no way inconsistent with American tradition. The method recognizes that the effectiveness of a Vice President depends almost completely on his relationship with the President. To achieve a good relationship, the Vice President and President must be of the same party and of compatible temperament and views. This is more readily assured under the proposed amendment than under any of the other proposals which were thoroughly considered by the Congress.²⁷

That a new Vice President *might* not be an elected official, although it is likely that he would be, does not weaken the vice presidential provision of the amendment. It should be recalled that for over 135 years of our existence the immediate successor after the Vice President was not a person directly elected by the people. From 1792 to 1886, when Senators were chosen by state legislatures, the President pro tempore of the Senate was the immediate successor after the Vice President. From 1886 to 1947 the Secretary of State, an appointed official, was the immediate successor. Even the present succession law places the members of the Cabinet in the line of succession after the Speaker and President pro tempore.

The vice presidential provision of the proposed amendment subjects the President’s nominee to confirmation not only by the Senate, as is the case under the Constitution with other presidential nominees, but also by the House of Representatives. Thus all congressional districts and all states have a voice in the selection of the new Vice President. In contrast to the regular presidential elections, where one cannot vote against a vice presidential candidate if he wants to vote for the presidential candidate, under the Bayh-Celler amendment the person nominated for Vice President must be judged solely on his own merits.

Professor Haimbaugh suggests that congressional confirmation would be nothing more than a formality. Yet it should be noted that the United States Senate has not been hesitant to disapprove presidential nominees who were not qualified for the office for which they were nominated.²⁸ It is unreasonable to

26. 17 S.C.L. REV. 315, 326-27 (1965).

27. See 43 CONG. DIG. 136-37 (1964).

28. The recent action of the Senate in rejecting the nomination of Francis X. Morrissey for federal district court judge is in point.

assume that the United States Congress would not give careful consideration to the qualifications of a nominee for the Vice Presidency and, if it felt he were not qualified, to reject his nomination. In this connection, the proposed amendment provides that a nominee must obtain the votes of a majority of each House of Congress. Each House would meet and vote separately and could have such hearings and discussions regarding the nominee as it thought desirable. Accordingly, the presence of Congress under this amendment does guarantee an important role for the representatives of the people in the process of vice presidential succession. /a

E. Conclusion

Professor Haimbaugh's criticisms of the Bayh-Celler plan for vice presidential succession are not justified. A line of succession beyond the Vice Presidency is a guarantee against catastrophe. It is not a substitute for having a Vice President at all times. A major requirement for the Vice Presidency is the person's qualifications for the Presidency. The office of Vice President offers the best apprenticeship for possible succession to the Presidency. This Nation cannot rely upon a succession law under which those in the line of succession are chosen almost exclusively on the basis of their qualifications for other positions as a substitute for a Vice President at all times.

The proposed twenty-fifth amendment deals with not only vice presidential succession but also the problem of presidential inability which has long been in need of solution.²⁹ No one claims that this amendment is perfect, covering every possible contingency. Indeed, no such claim was made on behalf of the Constitution itself. The following words of Benjamin Franklin, uttered at the Constitutional Convention of 1787, are appropriate:

I agree to this Constitution with all its faults, if they are such; because I think a general Government necessary for us. . . . I doubt . . . whether any other Convention we can obtain may be able to make a better Constitution. For when you assemble a number of men to have the advantage of their joint wisdom, you inevitably assemble with those men, all their prejudices, their passions, their errors of opin-

29. The author discusses the amendment and its background in *The Proposed Amendment on Presidential Inability and Vice-Presidential Vacancy*, 41 A.B.A.J. 915 (October, 1965); *The Proposed Twenty-Fifth Amendment to the Constitution*, 34 FORDHAM L. REV. 173 (1965).

ion, their local interests, and their selfish views. From such an assembly can a perfect production be expected? It therefore astonished me . . . to find this system approaching so near to perfection as it does. . . . Thus I consent . . . to this Constitution because I expect no better, and because I am not sure, that it is not the best. . . . I cannot help expressing a wish that every member . . . who may still have objections to it, would with me, on this occasion doubt a little of his own infallibility. . . . ³⁰

There is no other amendment to the Constitution which has been as thoroughly considered as the proposed twenty-fifth amendment. It is, as Walter Lippmann so well stated, "a great deal better than an endless search . . . for the absolutely perfect solution . . . which will never be found, and . . . is not necessary."³¹ The problems with which it deals involve the Nation's security. To leave these problems unsolved is to trifle with that security!

30. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 642-43 (Farrand ed. 1911 & 1937).

31. N.Y. Herald Tribune, June 9, 1964, p. 20.

VICE PRESIDENTIAL SUCCESSION: A BRIEF REBUTTAL

GEORGE D. HAIMBAUGH, JR.*

Mr. John D. Feerick's article, "Vice Presidential Succession: In Support of the Bayh-Celler Plan,"¹ adds to his already substantial contribution to an understanding of the vice presidency and the problem of vice presidential succession. Were it not for the remarks concerning the constitutionality of the present vice presidential succession law, I would have declined the invitation to reply and have been content to let my article² and his answer to it speak for themselves. Referring to an opinion held by a number of respected scholars,³ Mr. Feerick states that "there is reason to believe that the present law of vice presidential succession is unconstitutional . . . because of real doubt as to whether the Speaker or President pro tempore is an officer of the United States." However this statement was intended, it calls for an answer because it carries the implication that the present plan may be unworkable in the sense that the Supreme Court might be prevailed upon to depose a Speaker who had been sworn in as President pursuant to that law.

The Constitution provides that "the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President. . . ."⁴ Congress has exercised this power⁵ and it is highly unlikely that the Court would intervene. Mr. Justice Brennan wrote in the recent case of *Baker v. Carr*⁶—in an opinion not noted as an expression of judicial restraint—that,

prominent on the surface of any case held to involve a political [and therefore non-justiciable] question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or * * * the im-

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1. 18 S.C.L. REV. 226 (1966).

2. *Vice-Presidential Succession: A Criticism of the Bayh-Celler Plan*, 17 S.C.L. REV. 315 (1965).

3. See Silva, *The Presidential Succession Act of 1947*, 47 MICH. L. REV. 451, 457-64 (1949).

4. U. S. CONST. art. II § 1, para. 6.

5. 3 U.S.C. § 19 (1964).

6. 369 U.S. 186 (1962).

possibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.⁷

It has been suggested that since *Baker* the Court has acted in *Westberry v. Sanders*⁸ with regard to rights the protection of which has been given by the Constitution exclusively to Congress.⁹ But the Court acted in *Westberry* with regard to the validity of *state* apportionment laws and in a matter upon which the Congress had not acted. It follows that the question of whether the Speaker or the President pro tempore are, as the Congress has determined, officers eligible to succeed to the presidency is a constitutional issue which the Congress, not the Court, decides.

Also calling for an answer, perhaps, is the reference to "the past, upon which Professor Haimbaugh places so much reliance"—a surprising observation in view of the fact that Mr. Feerick in his conclusion quotes and relies upon a long statement made by Benjamin Franklin in 1787. If Mr. Feerick believes that my article contains too much historical documentation, some might think that parts of his answer require more.

For example, Mr. Feerick quotes with approval an assertion by William White that "Kennedy gave his Vice-President wide powers to negotiate and to act on behalf of the United States." But not a single example of diplomatic negotiations conducted by Vice President Johnson is offered.

Also, Mr. Feerick criticizes the present vice presidential succession act on the ground that "it would permit a political party different from that of the President and Vice President to take control of the Executive in the event of the death, resignation or removal of both the President and Vice President." This amounts to a contention that in such an eventuality it would be bad to have the new President be of the same political party as a majority of the members of the House of Representatives—a theory which is left wholly undeveloped.

7. *Id.*, at 217. In a concurring opinion, Mr. Justice Douglas wrote, "Where the Constitution assigns a particular function wholly and indivisibly to another department, the federal judiciary does not intervene." *Id.*, at 246.

8. 367 U.S. 1 (1964).

9. Employing the argument found in the opinion of Mr. Justice Frankfurter in *Colgrove v. Green*, 328 U.S. 549, 554 (1946).

The principal point made in my original article was that to grant the President "the constitutional power to nominate a Vice President would, under the circumstances of the tragic termination of one presidential administration and the honeymoon atmosphere attending the advent of another, tend to reduce the role of Congress in the matter to little more than a formality." The single example marshalled to rebut this contention is "the recent action of the Senate in rejecting the nomination of Francis X. Morrissey for federal district court judge."¹⁰ The weakness of the intended analogy is obvious when one considers that at stake in the one case would be the prestige of the President at the very outset of his administration while the other case involved, principally, the prestige of a junior senator-sponsor—the Congress having already manifested almost unparalleled support for the President from the time of his succession to office two years before.

Mr. Feerick expresses his great satisfaction with the four vice presidents who have succeeded to the Presidency in this century. His attention is called to the fact that these men all advanced under a system where the initiative in choosing candidates for the vice presidency is not a constitutional prerogative of one man. As they say in the Marine Corps, when you're shooting in the black, don't change your sights.

10. As a matter of fact, the Senate did not actually "reject" the Morrissey nomination. The Judiciary Committee of the Senate approved the nomination but, after debate, Senator E. M. Kennedy, who sponsored Judge Morrissey, moved that the nomination be sent back to committee. Kennedy claimed that a majority of the Senate would have voted for confirmation but Senator Dirksen said enough votes for recommitment were already available. N.Y. Times, Oct. 22, 1965. The nomination was later withdrawn by the President at the request of Judge Morrissey. N.Y. Times, Nov. 6, 1965.

PRESIDENTIAL CONTINUITY: THE TWENTY-FIFTH AMENDMENT

Richard P. Longaker*

I. THE ORIGINS

It is worthy of comment when Congress finally and overwhelmingly agrees to settle a constitutional issue which previous sessions of Congress have managed to avoid. It is also noteworthy when the issue is discussed on a high level of nonpartisan abstraction and consensus, both as to the urgent need for a solution and the solution itself; but it is especially noteworthy when the issue involves one of the most critical problems facing political regimes—the preservation of continuity in executive leadership.

The proposed twenty-fifth amendment to the Constitution, which is designed to end the accumulated ambiguities arising out of presidential inability,¹ passed both houses of Congress by an overwhelming vote in 1965. It has been approved by half of the 38 state legislatures required for adoption, and undoubtedly within a year or two it will take its place among the rapidly growing number of formal amendments to the Constitution.² A century of desultory congressional concern, which ebbed when dying Presidents were replaced or presidential illnesses had subsided, came to an end with the arrival of the nuclear age. But for the tragedy of Dallas and the presence of other chance factors, it is likely that constitutional drift would have continued. Even the succession of Eisenhower illnesses did not move Congress to joint action although hearings were held in response to the seriousness of the situation and proposals were reported out of committee. In the absence of congressional action following President Eisenhower's ileitis attack and stroke during his

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¹ Throughout this article the term "inability" will be used throughout rather than "disability." It is possible for a President to be disabled without being rendered unable to carry out the duties of his office. The term also connotes inability to act for reasons other than illness: breakdown in communications, capture by a hostile force, etc. The Constitution, art. II § 1, uses both terms, but the proposed twenty-fifth amendment avoids the term "disability," using instead "inability" and "unable."

² As of February, 1966, 19 states had ratified the Amendment: Arizona, Arkansas, California, Colorado, Delaware, Indiana, Kentucky, Maine, Massachusetts, Michigan, Nebraska, New Jersey, New Mexico, Oklahoma, Pennsylvania, Rhode Island, Utah, West Virginia, and Wisconsin. In 1965 Colorado rejected the Amendment, but this was reversed in February, 1966.

second term, the President and Vice President Richard Nixon reached an agreement on the temporary devolution of presidential authority in the event of illness or other occurrence rendering the Chief Executive incapable of exercising the powers and duties of the office. The agreement, the specific substance of which was known at first only to the President, Vice President, Sherman Adams, and the President's personal Secretary, was never published as an official document and was finally made known to the public through the avenue of a press release. It was essentially an effort to circumvent constitutional ambiguity by means of a personal vow between institutional associates.

The constitutional ambiguity had been clearly recognized since President Garfield's death by assassination in 1881. In operational terms, the Constitution fails to specify who determines that a President is unable to exercise his powers and duties, nor does it assist in answering when and how the inability is to be declared at an end.³ Moreover, before the passage of the proposed twenty-fifth amendment there was a respectable body of opinion that an ill President, who yielded his powers even temporarily, lost them permanently. The Eisenhower-Nixon agreement was a stop-gap measure of limited application which Presidents Kennedy and Johnson adopted as a pattern. Common to each of the agreements was the understanding that the President would declare his own inability, whereupon the Vice President would serve as Acting President. If the President was unable to communicate his inability, the Vice President, after "appropriate" consultation, would serve until the inability ended. In either case, the President was to decide the termination of his inability and resume the full powers and duties of the office.⁴

³ U.S. CONST. art. II, § 1 reads in part: "In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected."

⁴ For the original Eisenhower-Nixon agreement, see *New York Times*, March 4, 1958, p. 1, col. 2. The later agreements included President Kennedy and Vice President Johnson, *New York Times*, Aug. 11, 1961, p. 1, col. 3; President Johnson and Speaker of the House McCormack—under the Succession Act of 1947, next in line for the Presidency, *New York Times*, Dec. 6, 1963, p. 1, col. 8; and currently President Johnson and Vice President Humphrey, *New York Times*, Jan. 28, 1965, p. 13, col. 1. The only variation among the agreements is that President Kennedy specifically included the Cabinet as an "appropriate" body for consultation. Because Speaker McCormack, as a member of Congress, is barred from "holding any office under the United States," U.S. CONST. art. I, § 6, his position was particularly delicate following President Kennedy's assassination when there was no Vice President. Even a temporary presidential illness would have required the Speaker to resign from the House of Representatives.

Although some scholars believe the Eisenhower-Nixon solution is adequate, the overwhelming weight of opinion, Presidents and Attorneys General included, called for a more precise understanding in law that would extend beyond the terms of office of the principals and would reach toward a predictable procedural understanding of the Constitution itself. John F. Kennedy's assassination spread a diffuse sense of loss and anxiety about further losses throughout the political system;⁵ in more concrete constitutional terms, it conjured visions of a severely wounded President, unconscious and paralyzed, and a Vice President with only the fragile authority of a personal agreement to justify his assumption of the prerogatives of the world's most powerful office. There were other factors helping to produce change, however. After a decade of intermittent hearings, congressional committees had narrowed and refined a multiplicity of proposals for dealing with presidential inability into a few commonly accepted principles. Second, a mood of urgency replaced the relative complacency of the 1950's on this issue when a new *dramatis personae* and shifting political roles emerged. Before the mid-1960's there were compelling political, if not constitutional reasons, for avoiding a constitutional decision regarding presidential inability. Some Republican leaders hesitated to heighten public doubt about Eisenhower's health by encouraging adoption of formal inability procedures before the 1956 elections; others no doubt were reluctant to enhance Vice President Nixon's position by regularizing procedures for a transfer of power in the event of a presidential illness. Reluctance about making allusions to presidential health possibly stayed the hand of the Kennedy administration in initiating legislation on presidential inability, although the President's youth and vitality seemed to be assurance enough.⁶ But by 1964, the scene was set for widespread discussion of the question. It was common knowledge that President Johnson had suffered a serious heart attack in 1955 and that the ages of those next in line for the presidency, the Speaker of the House and President-pro-tem of the Senate, were 72 and 86 respectively. Prior to the election of 1964 there was little hope that the House would offend Speaker McCormack by approving a measure to fill the Vice Presidency by a new method or formulate inability procedures. After the Johnson-Humphrey inauguration the issue faded and the twenty-fifth Amendment passed overwhelmingly in the House; without doubt the bill was helped in the Senate because Vice President Humphrey had been a

⁵ See *THE KENNEDY ASSASSINATION AND THE AMERICAN PUBLIC* (Greenberg & Parker eds. 1965); *CHILDREN AND THE DEATH OF A PRESIDENT* (Wolfenstein ed. 1965).

⁶ *NIXON, SIX CRISES* 139-43 (1962) [hereinafter cited as *NIXON*]; *SORENSEN, KENNEDY* 38 (1965).

respected member of the Senate inner circle. Finally, there was strong presidential support for the measure; a Chief Executive without Johnson's Senate background might well have resisted this increment to congressional power.

Only in the immediate presence of presidential illness or death does the American public show concern about the inadequate constitutional means for dealing with the process of political succession. Because presidential inability or near inability have appeared in moments of domestic and international crisis, there is reason to be concerned. Quite apart from this, there is a statistical basis for concern. Since 1789 the United States has experienced five assassinations, over 600 days without a fully active President, eight Vice Presidential successions to the Presidency, and, related to this last contingency, thirty-seven years when there was no Vice President.⁷ Of the several contingencies only two were unequivocally covered in the Constitution. Since 1787 the Constitution has stated clearly that the Vice President is first in line of succession upon the death of a President. Also, there is no doubt that Congress can establish the line of succession in the event of removal, death, resignation, or inability of *both* the President and Vice President. But by device or accident the Constitution did not provide means for filling a vacancy in the Vice Presidency and left unanswered critical questions of appropriate constitutional behavior by the Vice President in the event of presidential death or inability. John Tyler provided one of the answers, but until the passage of the twenty-fifth amendment the others were unresolved.

William Henry Harrison died after little over a month in office in 1841. His death occasioned the first interpretation of Article II, Section 1, clause 6 of the Constitution, although Madison's near capture by the British in the War of 1812 and an attempt on the life of President Andrew Jackson in 1834 almost provided earlier opportunities. Harrison's illness developed soon after he delivered a lengthy inaugural address in bitter weather, was aggravated by a rainy shopping tour for White House supplies, and was speeded to its termination by the primitive medical treatment of the day. While Harrison lay critically ill Vice President Tyler remained in Virginia; he was the first of several Vice Presidents who were reluctant to move into a partial vacuum. Two days passed after Harrison's death before Tyler reached Washington. In the interim he apparently had examined the constitutional alternatives and decided neither to become "Acting" President for the remainder of Harrison's term nor to remain "Vice" President, but rather to become President in his own

⁷ See Appendix A *infra*.

right.⁸ Interpreting the words in article II, section 1 (“In case of the removal of the President from Office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President . . .”), Tyler concluded that “the same” embraced the office as well as the powers and duties. He took the oath of office but prudently recorded a declaration that the Constitution did not require him to do so because the office of President devolved on the Vice President automatically upon the death of the President and he had already taken an oath to perform the duty he was about to discharge.⁹

Although Tyler’s determination resolved one constitutional ambiguity, he stirred up other doubts for later Vice Presidents. Did the Tyler interpretation that, on the death of the President, the Vice President should assume the powers, duties, *and* the office of the President, extended by analogy to Vice Presidents who took charge when a President was seriously ill? If so, should a President declare his inability to discharge the office, he would be displaced for the remainder of the term. This uncertainty was to vex later Vice Presidents and presidential aides when prolonged presidential illness seemed to demand Vice Presidential leadership. Those closest to the President hesitated to support a Vice Presidential assumption of power, fearing that the office of the President might also be surrendered, perhaps permanently. Similarly, Vice Presidents were reluctant to assume a stricken President’s duties, when their constitutional position was not clear, partly out of the desire to avoid being accused of usurpation. There were other reasons for Vice Presidential reluctance—resistance by presidential intimates, partisan considerations, and, inevitably, the opposition of those in power to any shift in command relationship—but the procedural ambiguity in the Constitution certainly intensified the Vice Presidential dilemma.¹⁰

⁸ HANSEN, *THE YEAR WE HAD NO PRESIDENT* 7-8 (1962) [hereinafter cited as HANSEN]; MORGAN, *A WHIG EMBATTLED* 7-17 (1954) [hereinafter cited as MORGAN].

⁹ See FEERICK, *FROM FAILING HANDS* 92 (1965) [hereinafter cited as FEERICK]; MORGAN 8. Judge William Cranch administered the oath of office. Tyler cautiously requested that he certify as follows: “I, William Cranch, chief judge of the circuit court of the District of Columbia, certify that the above-named John Tyler personally appeared before me this day, and although he deems himself qualified to perform the duties and exercise the powers and office of President on the death of William Henry Harrison, late President of the United States, without any other oath than that which he has taken as Vice-President, yet as doubts may arise, and for greater caution, took and subscribed the foregoing oath before me.” 4 RICHARDSON, *MESSAGES AND PAPERS OF THE PRESIDENTS* 31-32 (1897).

¹⁰ Constitutional uncertainty did not inhibit Tyler, who filled a leadership vacuum—but a partial vacuum is something else again. As Woodrow Wilson’s Vice President, Thomas Marshall declared, “I am not going to seize the place and then have Wilson—recovered—come around and say ‘get off, you usurper.’” THOMAS, THOMAS RILEY MARSHALL: *HOOSIER STATESMAN* 226-27 (1939). For an even more difficult situation, see NIXON 134-39.

Ironically, the framers of the Constitution intended quite a different result. The original report of the Committee on Detail was a model of undistinguished clarity. The revisions by the Committee on Style (appointed to "revise the style and arrange the articles agreed to by the House") changed the original wording to more graceful obscurity. It is doubtful that the intent was anything more than stylistic, but the differences were critical.

*Reported to the
Committee on Style*

In case of his removal as aforesaid, death, absence, resignation or inability to discharge the powers and duties of his office the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.

*Revision of the
Committee on Style*

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the same office, the same shall devolve on the Vice President. . .¹¹

If the Committee on Style had not revised the wording originally approved by the Convention, each subsequent Vice President would have known that his responsibility, in the event of a serious presidential illness, would be fulfilled only as acting President until the inability was removed. Instead, by the end of John Tyler's term only two things were certain: (1) a Vice President assumed the office of the President as President, on the death of his successor, and (2) the language of the Constitution was of no assistance in delimiting the responsibilities of a Vice President when a President was ill, nor did the Constitution help to specify procedures for determining when a period of presidential inability began or ended. On three dramatic occasions after the Tyler episode, Vice Presidents juggled these uncertainties.

The death of Zachary Taylor while in office and Lincoln's assassination raised no serious problems of Vice Presidential succession. In 1881, however, Garfield was shot and lingered for eighty days, sometimes in a coma and with occasional hallucinations. Although presidential business was at a standstill Vice President Chester Arthur remained at a distance. Then as now, Vice Presidential nominations were a product of ticket balancing; Arthur was a leader of the Stalwart faction of the Republican party while Garfield was a leader of the reformist element, the Halfbreeds. The assassination, in fact, was a demented response to just this struggle

¹¹ 1 ELLIOT'S DEBATES 228, 302 (2d ed. 1836). For an excellent discussion of the proceedings of the Convention, see FEERICK 39-51. Alexander Hamilton refers to the Vice President who "may occasionally become a substitute for the President." THE FEDERALIST No. 68 (Hamilton).

within the party. Chester Arthur's position was made even more delicate when a letter informing him of the assassination and his "succession" to the Presidency was found in the assassin's pocket.¹² Arthur apparently decided to avoid any step that would embarrass either Garfield or his own followers. Nonetheless, as Garfield's inability stretched on, the Cabinet discussed the advisability of asking Arthur to act for the President. There were two conflicting viewpoints. The Cabinet agreed unanimously that it was desirable to have Arthur act as President, but only with Garfield's consent; the Cabinet then divided (4-3) on whether Arthur would become President for the remainder of Garfield's term even if Garfield recovered. This critical division of opinion, Garfield's inaccessibility, and Arthur's reluctance, led the Cabinet to back away. Garfield's death a few days later brought Arthur to the Presidency but left the constitutional questions unanswered.¹³

During Garfield's illness division of opinion was centered in the Cabinet and within the party; when Woodrow Wilson was incapacitated by a stroke in 1919 a bitter conflict developed between the Cabinet and White House intimates, including Mrs. Wilson. The President was taken ill in the midst of an exhausting cross-country trip designed to marshal support in the Senate for the Treaty of Versailles. Wilson had shown signs of severe and debilitating exhaustion while negotiating the peace settlement in Paris; but the real illness, including partial paralysis, did not become evident to those around him until he suffered a stroke in Wichita and a more severe one immediately after his return to Washington.¹⁴

In direct contrast to the graphic publicity associated with President Eisenhower's illnesses and President Lyndon Johnson's

¹² See FEERICK 118.

¹³ *Id.* at 135-38. See also Silva, *Presidential Inability*, 35 U. DET. L.J. 139 (1957).

¹⁴ One aide commented on the President's exhaustion in Paris: "Even while lying in bed he manifested peculiarities, one of which was to limit the use of all the automobiles to strictly official purposes, when previously he had been so liberal in his suggestions that his immediate party should have the benefit of this possible diversion, in view of the long hours we were working. When he got back on the job, his peculiar ideas were even more pronounced. He now became more obsessed with the idea that every French employee about the place was a spy for the French Government. Nothing we could say would disabuse his mind of this thought. He insisted they all understood English, when, as a matter of fact, there was just one of them among the two dozen or more who understood a single word of English. About this time he also acquired the peculiar notion that he was personally responsible for all the property in the furnished palace he was occupying. He raised quite a fuss on two occasions when he noticed articles of furniture had been removed. Upon investigation—for no one else noticed the change—it was learned that the custodian of the property for the French owner had seen fit to do a little re-arranging. Coming from the President, whom we all knew so well, these were funny things, and we could but surmise that something queer was happening in his mind." HANSEN 31.

gall bladder operation, the Wilson illness was wrapped in mystery. It was not a matter of good taste but rather a jealous guardianship imposed by the family and friends of the sick President. For long periods Wilson was out of touch with all but his wife and doctors and his personal secretary, Joseph Tumulty. Confused and confusing bulletins were released now and then, referring to the President as "a very sick man," who was in a "state of nervous exhaustion." The confusion continued week after week until Wilson, a visibly changed man, emerged to meet with his Cabinet some eight months after the initial stroke. In the interim all items of public business which were directed to the President were channelled through Tumulty, the President's physicians, and Mrs. Wilson. In the early weeks it is doubtful that the President was well enough to consider anything but the most minor items of public concern. Throughout the illness he was allowed to receive only those questions which would not harm his recovery. Cabinet meetings were called by Secretary of State Lansing twenty times in a four month period to transact what little business was possible under existing conditions.¹⁵ One commentator presents the following evidence of the price of Wilson's illness:

During the special session of the Sixty-sixth Congress, twenty-eight acts became law without the President's passing on them within the requisite ten days. Although he vetoed the Prohibition Enforcement Act on October 27, he did not pass on fifteen of the sixteen acts sent to the White House between October 28 and November 18. He did not meet his Cabinet for eight months after his collapse. He failed to answer the Senate Foreign Relations Committee's repeated requests that he take some action or supply the Committee with some information about the Shantung Settlement, a situation which prompted Senator Albert B. Fall to suggest that the Senate should recess until the President became able to resume the duties of his office. Although the Constitution says that the President shall receive the representatives of foreign states, the *New York Times* reported that Wilson's illness prevented him from seeing the Belgian sovereigns and the Prince of Wales when they visited the United States. . . .

This evidence is only a small part of that which could be presented to show that neither foreign nor domestic affairs received the President's proper attention. The Versailles Treaty was probably the most important casualty of Wilson's disability. He was forced to abandon his western tour in behalf of the Treaty. A month later, the Democratic leader in the Senate, Gilbert M. Hitchcock, believed he could work out a compromise with the Treaty's foes in the Senate. But Wilson's physicians would not allow Hitchcock to see the President. Hitchcock complained that he would have to consult with the President before he could agree to any compromises. Although it was reported five days later that Hitchcock had seen Wilson three times, many students of the period agree that the Treaty was defeated largely because of Wilson's

¹⁵ FEERICK ch. 13; HANSEN 29-42; SILVA, PRESIDENTIAL SUCCESSION 57-97 (1951).

isolation from public opinion, from his advisors, and from congressional leaders, whose advice he so badly needed in his enfeebled condition.¹⁶

Those in an official position of responsibility were little more informed than the general public. Vice President Thomas Marshall received no special information on the President's health, and when Secretary Lansing reputedly reminded Joseph Tumulty of the need for an acting President, Tumulty replied, "You may rest assured that while Woodrow Wilson is lying in the White House on the broad of his back, I will not be a party to ousting him."¹⁷ For this effort and his initiative in calling Cabinet meetings, Lansing was removed from office by President Wilson four months after his stroke.

In sum, the situation was highly resistant to reason. Personal animosities were mixed with constitutional uncertainty about the Vice Presidential role. Vice President Marshall (who is remembered in American folklore for his prescription, "What this country needs is a good five cent cigar") was not inclined toward political advancement in any case, and he perceived his own uncomfortable constitutional position. But had he stepped forward he would have precipitated a bitter constitutional conflict with the President's entourage, on constitutional grounds that were, to say the least, uncertain regarding the permanence of the Vice President's tenure and unclear about the means for determining inability when presidential consent and cooperation were lacking. The result was stalemate.

Although the definitive account of the Eisenhower administration's response to the President's illnesses cannot yet be written,¹⁸ it is evident that the performance contrasts sharply with the Wilson illness. Despite the immediate efforts by White House aides to minimize the attacks, the public and members of the President's cabinet and staff received clinically detailed reports on the President's condition. Also, the President's style of "team" leadership and his practice of delegating decision-making minimized the disruption of administrative patterns. Specifically, Sherman Adams carried on as the key figure in the administration, a role that had been assigned to him immediately after the 1952 election. Conflict within the administration was muted because of the established administrative patterns and because, unlike President Wilson, Eisenhower

¹⁶ *Id.* at 142-43. For an interesting popular account of Wilson's illness, see SMITH, *WHEN THE CHEERING STOPPED* (1964).

¹⁷ TUMULTY, *WOODROW WILSON AS I KNOW HIM* 443-44 (1921).

¹⁸ The dates of President Eisenhower's illnesses are as follows: Sept. 24, 1955, heart attack; June 9, 1956, ileitis operation; November 25, 1957, stroke. Especially helpful are ADAMS, *FIRSTHAND REPORT* ch. 10 (1961) [hereinafter cited as ADAMS]; NIXON pt. 3.

directed his Vice President to hold cabinet and other meetings. Conflict was also muted by Vice President Nixon's self-effacing posture and, in the case of the President's heart attack, by the deceptively quiescent state of international and domestic affairs.¹⁹ But members of the Eisenhower administration agreed that an illness lasting as long as Woodrow Wilson's or occurring during a time of international crisis, would have rendered even those administrative routines inadequate. For this reason tension rose noticeably within the administration when the President suffered a stroke in 1957.²⁰ International and domestic pressures on the White House were perceptibly more intense than they had been at the moment of the President's heart attack in 1955, and the members of the administration who had experienced the previous crisis were less sanguine about the procedures followed at that time. Vice President Nixon stood by in all three instances as doubtful of his constitutional position as other Vice Presidents had been when confronted by the problem of succession. Partly as a result of the second illness, proposals for constitutional amendments were sent to Congress in 1957 and 1958; finally in March 1958, with congressional action doubtful, the President and the Vice President announced that they had concluded their own agreement.

No doubt Vice President Nixon's position would have been less difficult had the agreement existed during all three presidential illnesses (it was only in effect during the stroke, but even then it was not known publicly). If the President's condition had deteriorated, procedures would have been at hand directing that the Vice President *should* take over as temporary executive until the President decided otherwise.²¹ Nonetheless it was a personal agreement without basis in a statute or in the Constitution. Furthermore, there is much to suggest that considerations other than constitutional insufficiency were operating. For one thing, the channels of influence and power did not run normally through Vice President Nixon's office; also, others stood to lose influence if the Vice President gained. It is not surprising that Sherman Adams was selected by the Cabinet (the decision was concurred in after mild objections by the Vice President) to go to Denver after the President's heart attack as "the sole official channel of information between Eisenhower and the world outside of the hospital room." Adams relates that Secretary of State John Foster Dulles proposed the arrangement: "In insisting upon having me with Eisenhower, Dulles was once again vigilantly protecting his own position as the maker of foreign

¹⁹ NIXON 134.

²⁰ *Id.* at 124-50; ADAMS 192.

²¹ *Id.* at 198-200.

policy.”²² Not surprisingly, Adams and others in the administration did not want the established pattern of influence and power disrupted, if it could be avoided. There were also forces in the party that wanted to avoid any step which might make Vice President Nixon the heir apparent and a candidate either in 1956 or in 1960. Among others, the President himself had doubts on that score.²³ An unpleasant struggle for influence within the administration and the party was avoided by preserving the appearance of the status quo. Beyond any abstract procedural virtues of a given constitutional provision to deal with presidential inability, the Eisenhower experience suggests that the success of any inability procedure will be determined by the manner in which the specific provisions and the political system at large absorb political factors such as these.²⁴

II. THE EVOLUTION OF THE TWENTY-FIFTH AMENDMENT

The congressional hearings which led to the passage of the twenty-fifth amendment began soon after President Eisenhower's heart attack. Over the next decade alternative solutions were focused upon and debated within Congress, the executive branch, and in journals of opinion.²⁵ History provided the raw material: the

²² *Id.* at 186.

²³ NIXON 161-62.

²⁴ Two other observations should be made about the Eisenhower experience with inability. In spite of full publicity within a few hours, there were periods during all three illnesses when the only press releases referred to “digestive upset” (heart attack), “upset stomach” (ileitis), and “a chill” (stroke). Of more significance for presidential inability and the command problem is that following the President's heart attack at 2:30 a.m., Dr. Howard Snyder, the President's personal physician, is on record as being the only one who knew about the President's condition. He wanted the President to benefit from “sedation” and the “decision also spared him, his wife and mother-in-law emotional upset upon too precipitant an announcement of such serious import.” FEERICK 213-25. For the moment medical and personal factors, not constitutional factors, were dominant. Similarly, some friends of the President were convinced that President Eisenhower should run for office again following his heart attack because not to do so might kill him. The reasoning was somewhat reminiscent of the calculations of President Wilson's physicians. Vice President Nixon reports, “Personal considerations, as always, played their role along with the political and public aspects of Eisenhower's decision. Several of his close friends and personal advisors became convinced that if he gave up his public life, he would never shake off the grip of despondency. General Lucius Clay, an intimate and long-time friend who could speak to him more frankly and bluntly than perhaps anyone else, observed a moody, depressed Eisenhower soon before he left Fitzsimmons Hospital, and from that day forward Clay worked all-out to get him to run for re-election. He called meetings and he rallied many of us privately to urge the President to run again for his own good. ‘I don't care what happens to the Republican Party, but if he quits, it'll kill him,’ was the way Clay, a Democrat, put it. The same opinion was held by Dr. Snyder, and, as time went on, others close to the President recognized the wisdom of Clay's attitude from Eisenhower's personal point of view.” NIXON 162-63.

²⁵ For articles which are worthy of attention, see Brownell, *Presidential Disability: The Need for a Constitutional Amendment*, 68 YALE L.J. 190 (1958); Constitu-

Tyler precedent, the serious illness of three Presidents, and the absence of any clear guidelines for determining or ending inability or for filling a vacancy in the Vice Presidency. By 1964 a rough consensus had been reached centering around a proposal made by Attorney General Brownell in 1957 and a set of principles adopted by a special committee of the American Bar Association in a two day session in 1964.²⁶ The principal issues will be discussed here in an ascending order of relative difficulty in reaching agreement on them.

Although there were strong arguments to the contrary, it was agreed by most congressional participants and commentators that the question of presidential inability should be dealt with by means of a constitutional amendment. There was virtually no dissent from the view that procedures for filling a vacancy in the Vice Presidency required an amendment largely because article I, section 6 authorizes Congress to legislate only when the Presidency and Vice Presidency are both vacant. But those supporting an amendment on the inability question met with greater resistance. Some argued that Congress should specify procedures by passing a joint resolution, avoiding ratification with its built-in rigidities and the lengthy time consumed. Professor Neustadt, one of the most respected authorities

tional Amendment Urged on Presidential Inability and Succession, 50 A.B.A.J. 237 (1964); Feerick, *Proposed Amendment on Presidential Inability and Vice-Presidential Vacancy*, 51 A.B.A.J. 915 (1965); Gilliam & Sloat, *Presidential Inability: The Problem and a Reconstruction*, 24 GEO. WASH. L. REV. 448 (1956); Haimbaugh, *Vice Presidential Succession: A Criticism of the Bayh-Celler Plan*, 17 S.C.L.Q. 315 (1965); Heinlein, *Problem of Continuity in the Presidency*, U. CINC. L. REV. 447 (1964); Hofstadter & Dinnes, *Presidential Inability: A Constitutional Amendment Is Needed Now*, 50 A.B.A.J. 59 (1964); Kuhn, *Presidential Inability and Vice Presidential Vacancy*, 32 TENN. L. REV. 1 (1964); Kury, *Crisis in the Law of Presidential Succession*, 36 PA. B.A.Q. 301 (1965); Powell, *The Risk of Having No President*, 36 OKLA. B.A.J. 354 (1965); *Presidential Inability and Vice Presidential Vacancy*, 44 MICH. S.B.J. 20 (1965).

For the applicable hearings and reports of Congress, see *Hearings Before the Special Subcommittee to Study Presidential Inability of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 20 (1956); *Hearings Before the Special Subcommittee on Study of Presidential Inability of the House Committee on the Judiciary*, 85th Cong., 1st Sess., ser. 3 (1957); *Hearings on Presidential Inability Before Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess. (1958); *Hearings on Presidential Inability Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 88th Cong., 1st Sess. (1963); *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. (1964); STAFF OF SENATE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT (Comm. Print 1965).

²⁶ *Hearings Before the Special Subcommittee on Study of Presidential Inability of the House Committee on the Judiciary*, 85th Cong., 1st Sess., ser. 3, at 4-32 (1957); for a report by a participant on the A.B.A. Committee, see FEERICK 244-54; the report is in 50 A.B.A.J. 237 (1964).

on the Presidency, opposed a constitutional amendment on the grounds that inability procedures should grow out of "the common law accretions" of the Constitution, specifically the evolution of personal agreements between Presidents and Vice Presidents. Aside from the difficulty of ever amending an amendment, Neustadt feared a weakening of the Presidency by the formation of a regency council (the Cabinet or a special commission determining inability); or put more simply, placing power to remove the President in the hands of someone other than the President himself.²⁷

In opposition to these considerations it was said that personal agreements between President and Vice President do not carry force in law or protection against challenge. Alluding to the Wilson experience, Vice President Nixon noted the fragility of such agreements in the event of conflict between the President's "personal family and the President's official family," and the natural reluctance of a Vice President to move without unequivocal constitutional authorization.²⁸ Further, because most of the procedures proposed included participation by the Cabinet or a special advisory group, it was argued that inasmuch as the Vice President was given no choice under the Constitution but to act in the event of presidential inability, any proposal that required him to share the power of decision required a constitutional amendment.²⁹ There was also generalized uncertainty over the power of Congress to legislate in this area.

The two sources of power usually referred to by those who favored the legislative alternative were the inability provisions in article I, section 1 and the necessary and proper clause. The conclusion drawn by the Judiciary Committees in both Houses was that article I, section 1 authorized a statutory solution only when the President and Vice President are incapable of executing the powers and duties of the Presidency. As for the necessary and proper clause, it was assumed that power was not specifically vested in Congress to determine inability, nor when and how the President could regain his prerogatives. Under article II, section 1, Congress was only empowered to determine a successor if both the President and Vice President were immobilized. Without powers being vested, it was argued, Congress could hardly act to carry them out.³⁰

²⁷ *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 166-70 (1964).

²⁸ *Id.* at 241.

²⁹ See Attorney General Brownell's testimony, *Hearings Before the Special Subcommittee on Study of Presidential Inability of the House Committee on the Judiciary*, 85th Cong., 1st Sess., ser. 3, at 12 (1957).

³⁰ STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON

Above all, the uncertainty about the power of the Executive or Congress to act, together with the very serious implication of a Vice Presidential assumption of presidential power, called for the legitimating effect of a constitutional amendment. If the occasion arose, the Vice President (and the President if he were capable of giving consent) would have to act speedily to maintain continuity in the executive branch unburdened by questions of constitutionality. The consensus which gradually emerged was based in part on a fundamental policy understanding that delay by challenge in the courts or elsewhere would shatter the continuity of executive leadership and thereby endanger the nation. Further, only an amendment would free the Vice President from a web of constitutional inhibitions by imposing on him a duty to assume power, however temporarily, in the event of serious illness or other inability. The procedures, it was finally concluded, were to be enumerated as distinctly as possible in an amendment to the Constitution.

There was initial agreement that one of the key elements of any constitutional amendment would be a provision removing the uncertainties arising from temporary presidential inability. It was assumed that the conduct of Vice Presidents Arthur, Marshall, and Nixon had been affected by the constitutional obscurity brought to light in the Tyler precedent, namely the length of their tenure should they decide to exercise the powers and duties of the Presidency.³¹ Adding force to this historical point was a more contemporary, if fugitive, current of opinion which held that the Vice President would assume the powers *and* office of the Presidency for the remainder of the term whether the President died or was temporarily unable to fulfill his responsibilities. Former President Truman contended that a permanent accession to power was the proper constitutional solution partly because a Vice President, acting as President, could be effective only if protected from reprisal by his predecessor.³² Enough doubt existed to bring quick agreement regarding the desirability of including in the amendment the flat pronouncement that the Vice President became Acting President only for the period

PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT 9 (Comm. Print 1965); STAFF OF SENATE COMM. ON THE JUDICIARY, 89TH CONG., REPORT ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT 9 (Comm. Print 1965). See also FEERICK 247; Kuhn, *Presidential Inability and Vice Presidential Vacancy*, 32 TENN. L. REV. 4-5 (1964).

³¹ STAFF OF SENATE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT 5 (Comm. Print 1965).

³² *Hearings on Presidential Inability Before Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess. 13 (1958). See also FEERICK 247.

of presidential inability. Although he was to exercise the powers and duties of the Presidency, he would not hold the office.

The method of filling a vacancy in the Vice Presidency was agreed upon just as easily. Until the election of Vice President Humphrey in 1964, there was only the most circumspect discussion of the question in Congress, largely in deference to Speaker McCormack.³³ Immediately after the election, however, sentiment began to be heard on the question of congressional participation in the process. The alternatives ranged from election by the Electoral College to election from among a panel of cabinet members and members of Congress, "by and with the advice and consent" of the President.³⁴ The rationale for congressional initiative was to prevent the President from choosing his successor—which ignored the fact that the presidential nominee traditionally names the Vice Presidential candidate at the nominating conventions. The justification for election by the electoral college was to avoid conflict if the President and Congress were of different party persuasions and to assure the participation of a popularly elected body. There was little enthusiasm for either alternative, and dominant opinion centered on presidential initiative and congressional consent.

An ancillary but potentially momentous issue was avoided when the Senate Committee on the Judiciary deleted any specified time period from its bill. At one time the bill had required the President to nominate a Vice President within thirty days after a vacancy occurred. It is unclear whether those considering the proposed amendment understood the implication of such a restriction on the President.³⁵ Nonetheless, it is generally recognized that a President's power is closely related to his ability to hold choice, and therefore power, in abeyance. Naturally, rational deliberation about an heir apparent is least effective if it is hemmed in by the calendar. The rigid time requirement was wisely deleted.³⁶

³³ This circumspect attitude extended to President Johnson who, when asked about the matter in 1964, responded that the issue was important but "I don't have any deep-set views on just how that should be done." *New York Times*, March 15, 1964, p. 40, col. 1.

³⁴ Vice President Nixon proposed election by the Electoral College. *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 241-42 (1964). See also *id.* at 53.

³⁵ A recommendation that the thirty day limitation be deleted in the interest of flexibility was made during the hearings on S.J. Res. 1 in 1964. *Id.* at 229 (testimony of Clinton Rossiter).

³⁶ The shifting patterns of administrative and political power in the thirty days following President Kennedy's assassination demonstrates that a new President's decision should not be forced before he can clarify his own position. Also, one of the most productive political games played by Lyndon Johnson during the spring of 1964

These issues were resolved with comparative ease. Differences deepened over the solution to the perennial vexing questions regarding the inability provision: who was to participate in the determination of presidential inability; who was to decide that the inability had ceased; how were conflicting diagnoses of the President's state of health to be resolved? Each question produced a rich variety of solutions nearly all of which presumed that the President was fully authorized to determine the beginning and end of his own inability if he was in a position to communicate the decision and if his interpretation was not challenged. It was also generally agreed that absent a decision by the President, the Vice President was the key figure. More difficult to decide was whether the Vice President should share his decision making with another body, how that body should be constituted, and under what if any circumstances the Vice President's findings could supersede a contrary finding by the President.

Consultation between the Vice President and Cabinet was the prevailing solution of the several solutions examined over the ten year period following President Eisenhower's heart attack. Other proposals which were seriously considered included (1) unfettered presidential discretion in determining when he has regained his powers,³⁷ with protection against abuse of his discretion lying only in the impeachment power; (2) a determination of inability by a commission of medical specialists, the Chief Justice, the Secretaries of State and Defense, and the Speaker of the House and Majority Leader of the Senate;³⁸ (3) a determination by the Supreme Court responding to a resolution approved by two-thirds vote of Congress "suggesting" presidential inability; (4) a finding by Congress itself.³⁹ Those who had initially argued that the President should decide when his inability was at an end with disputes to be settled by the impeachment power, soon relented because of "the odium," uncertainty, and protracted nature of the impeachment process, as

involved the Vice Presidency. Theodore White describes the President's process of sifting out Vice Presidential nominees: "In its mixture of comedy, tension and teasing, it was a work of art; it was as if, said someone, Caligula were directing *I've Got A Secret*." WHITE, *THE MAKING OF THE PRESIDENT*, 1964, at 282 (1965). See also *id.* at 260.

³⁷ One variation appears in Attorney General Brownell's testimony. *Hearings Before the Special Subcommittee on Study of Presidential Inability of the House Committee on the Judiciary*, 85th Cong., 1st Sess., ser. 3, at 30 (1957).

³⁸ *Hearings Before the Special Subcommittee to Study Presidential Inability of the House Committee on the Judiciary*, 84th Cong., 2d Sess., ser. 20, at 81, 94-95 (1956).

³⁹ *Id.* at 35. See also *Hearings on Presidential Inability Before Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess. 24 (1958).

well as the fact that inability itself is not a high crime or misdemeanor.⁴⁰ The proposals to use the Supreme Court (or the Chief Justice sitting as a member of a special commission) were undermined when Chief Justice Warren wrote to the Senate subcommittee that such responsibility would violate the separation of powers and involve the Supreme Court in political controversy.⁴¹ The idea of giving Congress the task of determining when inability began or ended was dismissed after candid introspection on the part of members of Congress: the debate would be long, tedious, time consuming, and partisan.⁴² In this discussion, as elsewhere, the principle of the separation of powers was alluded to; but the invocation had a hollow ring. There were arguments against congressional involvement far more compelling than the separation of powers (e.g., its cumbersome process when speed is essential) or participation by the Supreme Court (which could be enmeshed in bitter partisan conflict). Moreover, many of the proposals, although not giving Congress the role as primary agent in determining inability, did involve Congress in other capacities, including the election of the Vice President.

⁴⁰ *Id.* at 155.

⁴¹ *Id.* at 14:

Supreme Court of the United States
Washington, D.C., January 20, 1958.

Hon. Kenneth B. Keating
Member of Congress
Washington, D.C.

MY DEAR MR. CONGRESSMAN: During the time the subject of inability of a President to discharge the duties of his office has been under discussion, the members of the Court have discussed generally, but without reference to any particular bill, the proposal that a member or members of the Court be included in the membership of a Commission to determine the fact of Presidential inability to act.

It has been the belief of all of us that because of the separation of powers in our Government, the nature of the judicial process, the possibility of a controversy of this character coming to the Court, and the danger of disqualification which might result in lack of a quorum, it would be inadvisable for any member of the Court to serve on such a Commission.

I realize that Congress is confronted with a very difficult problem, and if it were only a matter of personal willingness to serve that anyone in the Government, if requested to do so, should make himself available for service. However, I do believe that the reasons above mentioned for nonparticipation of the Court are insurmountable.

With best wishes, I am,
sincerely,

Earl Warren,
Chief Justice

⁴² *Hearings on Presidential Inability Before Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess. 24-25 (1958); *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 70-72 (1964); *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 26-27 (1965).

The proposal which died hardest was the so-called Inability Commission in its several variations. Support for a commission of top government officials, top citizens, and top medical men was stimulated by the comforting lure of expertise. Its appeal gradually waned as supporters of the idea came to realize that persons known for their experience and expertise inevitably would be consulted⁴³ and that a severe presidential illness was essentially a political problem to be solved, if at all, by political instrumentalities.⁴⁴ An equally persuasive argument against an Inability Commission was the prospect of time-consuming deliberations, conflicting medical testimony, and the possibility of a divided vote in full public view. Nonetheless, the concept of a Commission had enough vitality to produce an important concession in the final wording of the amendment. The Vice President and the Cabinet were to be the basic participants but the authors of the amendment added "or . . . such other body as Congress may by law provide. . . ." This provision could yield some upsetting political results.

In sum, the view that prevailed was that if a President were unable to declare his own inability by reason of illness or accident, Cabinet participation in a decision by the Vice President would strengthen the hand of a reluctant Vice President and encourage an immediate decision. The cohesive nature of the Cabinet would tend to avoid the possibility of embroiling a special commission in long and contentious deliberations on the questions. As consultants the Cabinet was chosen because it is more likely to be composed of presidential intimates who, in their administrative capacities, would be aware of the state of the President's health and would also be immediately available. It was argued also that the Cabinet would inspire popular confidence and thereby lend an added note of legitimacy to the Vice President's decision.⁴⁵ But, if Congress were to

⁴³ Prior to President Lyndon B. Johnson's gall bladder operation he made a public announcement stating that the Vice President was fully informed in policy matters and during the operation would be in Washington with the White House staff and the Secretaries of State and Defense. He announced that he had consulted with the Vice President, the Cabinet, congressional leaders, and former President Eisenhower about his decision. Obviously, his physicians were consulted too. *New York Times*, Oct. 6, 1965, p. 1, col. 8.

⁴⁴ There was the unsettling record of the Wilson medical team. The President's nerve specialist argued against any declaration of inability because he doubted the capacities of Vice President Marshall, did not want to see the Versailles treaty provisions defeated, and believed that recognition might damage his patient's health further. Silva, *supra* note 13, at 163-64; *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 161 (1964). For a set of proposals seeking to place the decisions of experts in a position of primacy with respect to the mental health of government officials, see ROGOW, JAMES FORRESTAL 347-50 (1963).

⁴⁵ STAFF OF SENATE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT 13

decide in the future that the Cabinet mechanism was inadequate, recourse to the legislature would still be possible.

The most perplexing constitutional question remained. How should conflicts be resolved between the Vice President and Cabinet on the one hand and the President on the other? The least unpleasant situation involves a President who is ill but refuses to declare his own inability out of a sense of duty. More complicated is the situation in which a President jealously guards his power although unable to exercise it. Most unpleasant of all is the possibility that a President might refuse to yield power or attempt to regain power while mentally ill.⁴⁶ Conflict is possible either when the Vice President and Cabinet discover that the President is ill while the President executes full constitutional powers and refuses to declare his own inability, or if the President attempts to return to power against the best judgment of the Vice President, Cabinet, and medical consultants. The solution proposed by the special committee of the American Bar Association and adopted with some modifications by Congress, placed the legislature in an appellate role. Specifically, if a President declares a state of inability at an end, and if

(Comm. Print 1965). For an excellent discussion of the Cabinet's role, see Attorney Brownell's testimony in the *Hearings Before the Special Subcommittee on Study of Presidential Inability of the House Committee on the Judiciary*, 85th Cong., 1st Sess., ser. 3, at 27-30 (1957).

⁴⁶ The history of the Presidency reveals no instances of mental illness diagnosed as such although the hypersensitivity of some ill presidents might, on investigation, show approximations of mental illness. See generally MARX, *THE HEALTH OF PRESIDENTS* (1960). Wilson's alleged paranoia might be a case in point. The best known recent case at the Cabinet level is that of James Forrestal. See generally ROGOW, *op. cit. supra* note 44.

The most famous of recent instances at the state level involved Governor Earl Long of Louisiana. In a series of events verging on *opera bouffe*, the Governor was allegedly drugged and spirited from the state by his wife in a Louisiana National Guard plane for treatment in a Texas hospital. After agreeing to submit to treatment in Louisiana, Long was committed to the Southeast Louisiana Hospital at Mandeville under court order, an order which was effective until the hospital superintendent decided the Governor was well enough to be released. Long removed the hospital superintendent (and for good measure, the director of the State Department of Hospitals and the Chief of the state police). His new appointees declared him sane. His return to active public life is recorded in one of the more memorable volumes on American politics. Immediately after his release from the hospital, a disciple, Joe Arthur Sims, introduced the Governor at a political rally. As A. J. Liebling describes the scene, quoting Mr. Sims, "When our beloved friend, the *fine* Governor of the Gret Stet of Loosiana, sent for me in his need at Mandeville . . . his conditions had been *so MISREPRESENTED* . . . that people I knew said to me, 'Don't you go up there, Joe Sims. That man is a *hyena*. He'll BITE YOU IN THE LAIG.' But I went. I went to Mandeville, and before I could reach my friend, *the armed guard had to open ten locked doors*. and lock each one of 'em again after us. And theah, *theah*, I found the *FINE* Governor, of the Gret Stet of Loosiana . . . without *SHOES*, without a stitch of *CLOTHES* to put awn him, without a friend to counsel with. And he was just as rational as he has ever been in his life, or as you see him here today. He said, 'JOE SIMS, WHERE THE HELL YOU BEEN?'" LIEBLING, *THE EARL OF LOUISIANA* 35 (1961). See also FEERICK 288-91.

the Vice President and the Cabinet contest the declaration, the question is to be submitted to Congress for a decision. The Vice President remains as Acting President until, by two-thirds vote of each House, the condition of inability is affirmed. Without a two-thirds vote, the President is to regain the powers and duties of the office. A two-thirds majority was adopted because of the analogy to the vote required for impeachment. Moreover, Congress concluded that the scales should be weighted against those in disagreement with the President, because he is popularly elected.⁴⁷ This sally into the constitutional never-never land of palace-guard politics, insanity, and open struggle for the nation's highest office, occasioned the only real dispute between the Senate and House during passage of the proposed twenty-fifth amendment. The issue was whether to impose a time limit on a congressional determination that the President is unable to carry out the duties of his office. For nearly ten weeks the House and Senate conferees were deadlocked on whether to adopt the wording of the Senate committee report ("shall immediately proceed to decide the issue") or the House wording ("within ten days").⁴⁸ The Senate tradition of unlimited debate clashed with the more restrictive House rules. In particular the House managers feared that a determination of inability might become subject to a filibuster or other delaying tactics used as weapons in a struggle for power. A compromise was finally reached requiring congressional action within twenty-one days.⁴⁹

III. CONGRESSIONAL INTENT

Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

Section 1 embeds the Tyler precedent in the Constitution. If the office of the Presidency is vacant, a Vice President becomes President in his own right. One service rendered by this provision is to

⁴⁷ *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 152 (1964).

⁴⁸ STAFF OF SENATE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT 16 (1965); STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT 16 (Comm. Print 1965).

⁴⁹ The floor action on S.J. Res. 1 is found in 111 CONG. REC. 14587 (daily ed. June 29, 1965); *id.* at 14665-66, 14831 (daily ed. June 30, 1965). The vote for passage was 68-5 in the Senate, 111 CONG. REC. 15031-32 (daily ed. July 6, 1965), and 328-29 in the House on passage before the Conference Report, *id.* at 7069 (daily ed. April 13, 1965), with voice vote approval of the Conference Report, *id.* at 14668 (daily ed. June 30, 1965).

set off clearly by exclusion the acting status of the Vice President when inability exists, an ambiguity unresolved in article II, section 1, clause 6.⁵⁰

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both houses of Congress.

The United States has been without a Vice President sixteen times.⁵¹ One Vice President resigned, eight became President on the death of the President, and seven died in office. Section 2 of the proposed amendment makes it possible to keep the office filled at all times. The amendment sets no time limit for a presidential nomination to fill a vacancy. Although there may be political reasons for delay,⁵² prolonged vacancy creates dangers which the section was designed to eliminate, for unlike other executive offices when vacant, the functions cannot be deputized. Therefore, the constitutional presumption seems to be for speedy action by the President. The case for speedy action is reinforced by the sense of deliberate urgency found elsewhere in the amendment. Section 4 requires the Vice President to become Acting President "immediately" after a finding of presidential inability. The same section sets a restricted time limit on congressional action when conflicting estimates of presidential inability emerge. There is no reason to suppose that a similar intent does not hold for this section.⁵³

The vote of confirmation is by both Houses acting separately,⁵⁴ and by a majority of those members present and voting, a quorum being present.⁵⁵ There is no limit to the number of times a President

⁵⁰ STAFF OF SENATE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT 12 (Comm. Print 1965).

⁵¹ See Appendix A, Table II *infra*.

⁵² See text accompanying note 36 *supra*.

⁵³ At one time the bill under consideration by the Subcommittee on Constitutional Amendments of the Committee on the Judiciary specified a thirty day limit. The deletion was not intended to lessen the urgency, but rather to avoid providing additional language for the situation where the first presidential nominee was rejected and the second (or third) could not be approved within the thirty day period. Also, thirty days was held to be unnecessarily specific. *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 88th Cong., 2d Sess. 228-29 (1964).

⁵⁴ 111 CONG. REC. 7675 (daily ed. April 13, 1965).

⁵⁵ STAFF OF SENATE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT 14-15 (Comm. Print 1965). On this question Attorney General Katzenbach recommended that the nature of the majority appear in the final Committee report. It did not, but the exchange between Senator Bayh and the Attorney General indicates implicit acceptance of the stated majority and reliance on *Missouri Pac. Ry. v. Kansas*, 248 U.S. 276 (1918).

may put forward nominees if his initial choice is rejected by Congress; conversely, there is no limit on the number of candidates Congress may turn down. No explicit or implicit procedural instrument for ending a deadlock appears in the record. It can be conjectured that Congress should look favorably on the President's nominee by analogy to the custom of nominating conventions of accepting the presidential candidate's choice for a vice presidential running mate⁵⁶ and the high likelihood of favorable Senate action on other high executive nominations made by the President.⁵⁷

Section 3. Whenever the President transmits to the President Pro Tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

Section 3 strikes directly at the problem which has been put forth by some authorities as the key factor in Vice Presidential reluctance to take part in a transfer of the powers and duties of the office temporarily: the uncertainty of a Vice President's status if he assumes the powers of the Presidency, and also the question of whether the powers are to be exercised temporarily or until the end of the President's term. The section specifies that upon a declaration of inability he will assume the powers and duties but not the office of the President, and therefore he will be Acting President, not President in his own right.⁵⁸ This responsibility is to terminate the moment inability has ended. Section 3 makes clear that the President is the prime initiator of a declaration of inability, assuming that he is aware of the condition or can foresee it. The President also has the prime authority to declare his inability at an end. A

⁵⁶ STAFF OF SENATE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT 89 (Comm. Print 1965).

⁵⁷ CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 73 (1957); HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 259 (1953).

⁵⁸ Senator Bayh, the manager of the bill in the Senate, stated for the record the following definition of inability under § 4: "[T]he word 'inability' and the word 'unable' as used in [§ 4 of] this article, which refers to an impairment of the President's faculties, mean that he is unable either to make or communicate his decisions as to his own competency to execute the powers and duties of his office" The statement was an elaboration of a definition which included illness and other factors under both §§ 3 and 4: "[T]he intention of this legislation is to deal with any type of inability, whether it is from travelling from one nation to another, a breakdown of communications, capture by the enemy, or anything that is imaginable. The inability to perform the powers and duties of the office is inability under the terms that we are discussing." *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 20 (1965).

President declares his inability to Congress by transmitting a written statement to the constitutionally designated officers of the House and Senate; he may regain his powers by the same unilateral process. The President may declare "either an indefinite or a specified period of time, and [can] specify a particular hour of commencement of the Vice President's role as Acting President."⁵⁹ The Senate draft of the amendment originally stated, "If the President declares in writing that he is unable to discharge the powers and duties of his office, such powers and duties shall be discharged by the Vice President as Acting President." This wording was attacked as leaving open to question the right of the President unilaterally to announce that he had regained his powers because it did not specifically state that he could do so; also it left unclear whether the Vice President and Cabinet could challenge a presidential declaration ending inability when the initial declaration of inability had been made by the President himself. Critics emphasized that any ambiguity in the language prescribing the process of regaining power might make Presidents reluctant to yield power to the Vice President in the first place.⁶⁰ The section was amended. Consequently, congressional intent under section 3 is that a President *voluntarily* relinquishing his powers and duties may unilaterally regain them by declaring the inability to be at an end. A challenge by the Vice President and the Cabinet is restricted to conditions anticipated under section 4.

Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President Pro Tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

Thereafter, when the President transmits to the President Pro Tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit within four

⁵⁹ *Hearings Before the House Committee on the Judiciary*, 89th Cong., 1st Sess., ser. 1, at 240 (1965).

⁶⁰ STAFF OF SENATE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT 14-16 (Comm. Print 1965). For the House draft, see STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT 12-13, 15-16 (Comm. Print 1965).

⁶¹ *Id.* at 12-13. The President, under these conditions, immediately regains the powers and duties of office. There is no reason why the Vice President and Cabinet could then proceed under § 4, but unlike § 4 the President would be in office.

days to the President Pro Tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.⁶¹

If a President cannot or does not declare his inability, the Vice President and a majority of the Cabinet may do so by informing Congress of the state of inability in a written declaration. The Vice President will assume the powers and the duties of the office immediately without further communication with Congress. When the President informs Congress that the inability no longer exists, the President resumes the powers and duties of the office unless the Vice President and a majority of the Cabinet object and inform Congress of their disagreement within four days. In the event of such a challenge Congress is to convene automatically within forty-eight hours and must decide the issue within twenty-one days after convening. If the two Houses do not uphold the challenge by a two-thirds vote, the President will resume the prerogatives of office.

A proper construction of the amendment would be that until such a determination is made the Vice President will remain as Acting President. On its face, section 4 of the amendment is ambiguous, because no specific language governs whether or not the President automatically resumes the powers and duties of office until his declaration of ability is challenged by the Vice President and Cabinet and the matter is thrown into Congress. One possible interpretation would be that as soon as the President has made his declaration, his powers are restored automatically subject to defeasance by the Vice President and Cabinet acting within four days. Alternatively, the record definitely supports the interpretation that the President would not be permitted to resume office until the four day period has expired without such challenge by the Vice President and Cabinet; however, the President could do so immediately with the concurrence of the Acting President.⁶² The presumption

⁶² *Hearings on Presidential Inability and Vacancies in the Office of Vice President Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary*, 89th Cong., 1st Sess. 17-18 (1965); STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT 14 (Comm. Print 1965); *Hearings Before the House Committee on the Judiciary*, 89th Cong., 1st Sess., ser. 1, at 42, 58, 99-100 (1965).

underlying section 3, allows the President unilaterally to declare the inability at an end. However, the assumption on which section 4 is based is that if the difference in opinion between the President and Vice President is so great that the Vice President and Cabinet feel they must act contrary to the President's wishes, then the President should not be allowed unilaterally to resume the powers and duties of office without a waiting period during which the Vice President and Cabinet may object and submit the matter to Congress.

Other interpretations of the language in section 4 appear in the legislative record. Either the Cabinet *or* the Vice President may *initiate* inquiry into presidential inability although the declaration to Congress must have the blessing of the Vice President and a majority of the Cabinet.⁶³ The "Cabinet" as defined in the language of the amendment consists of "the principal officers of the executive departments," or only the traditional departments appearing in sections 1 and 2 of 5 U.S.C. and any executive department established in the future "generally considered to comprise the President's cabinet."⁶⁴ Beyond these statements of intent, the phrasing which caused the most discussion in the Senate debate on the amendment was the provision for an auxiliary body which appears in section 4: "a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide. . . ." Critics asserted that the wording as it stood was a source of potential conflict between two authoritative bodies. They were not satisfied when the floor managers assured them that the purpose of the clause was to provide an alternate mode for deciding issues of inability after experience with the amendment. In any event, it was argued, the two bodies could not conflict, for if Congress created another body it would possess exclusivity and supersede the Cabinet on the issue.⁶⁵ It was stated specifically as legislative intent that twenty-one days is to be the limit for a decision by Congress and, if possible, a decision should be made before the end of that period.⁶⁶ If either House declines to sustain by two-thirds vote a challenge to presidential resumption of duties pursuant to a declaration by the President that his inability has ended, the powers and duties of the President would revert to him forthwith. There are no limits on congressional consideration of the question after the twenty-one

⁶³ *Hearings Before the House Committee on the Judiciary*, 89th Cong., 1st Sess., ser. 1, at 79-82 (1965).

⁶⁴ STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT 3 (Comm. Print 1965); 111 CONG. REC. 3200-01 (daily ed. Feb. 19, 1965).

⁶⁵ *Id.* at 14667 (daily ed. June 30, 1965); *id.* at 15023 (daily ed. July 6, 1965).

⁶⁶ *Id.* at 14665-66 (daily ed. June 30, 1965).

day period but the President will regain the prerogatives of office.⁶⁷ Conversely, there is nothing in the amendment or in its legislative history to prohibit the President, if the challenge is upheld by two-thirds vote of both Houses, to continue to declare his inability at an end or to prohibit continued challenges of the declaration by the Vice President and the Cabinet. On balance, there is no doubt that the procedures favor the President unless the political system itself begins to crumble.

IV. CONCLUSION

When the twenty-fifth amendment is first applied, flaws now hidden will no doubt appear. Some of the inevitable imperfections are already evident, though their seriousness will depend on factors extrinsic to the wording of the amendment. For example, perhaps Congress should not have required a numerical majority of the Cabinet to concur in a finding of inability. Should a decision of such gravity be left to the whim of a simple majority when in fact it is more realistic to suppose that any expression by the Cabinet that is not unanimous would stimulate discord? More fundamentally, should the Cabinet have been introduced into the formal process at all? Should not a Vice President, whose constitutional duty it is to decide this critical issue of public policy objectively, be able to consult those who have no immediate administrative or personal stake in the outcome? And does the theory of exclusivity truly remove the possibility of conflict between rival bodies in their evaluation of a President's health? Should the amendment have prohibited the use of the removal power, either by the President or the Acting President, when the issue of the President's ability to exercise the powers and duties of the office is in question? Finally, the great particularity of the provisions of section 4 (indeed the very existence of it will likely be used in case of a challenge procedure) can be questioned, because bizarre, if not psychotic behavior usually associated with a Dr. Strangelove, a Captain Queeg, or, as one committee report said, "rogues [with] no sense of constitutional morality."⁶⁸ Unfortunately, such a case would require far more subtle and imposing procedures than section 4 specifies.

These questions can properly be raised although none of them seems to strike at the soundness of the amendment as a constitutional mechanism for filling vacancies in the Vice Presidency and

⁶⁷ *Id.* at 14587, 14837.

⁶⁸ STAFF OF HOUSE COMM. ON THE JUDICIARY, 89TH CONG., 1ST SESS., REPORT ON PRESIDENTIAL INABILITY AND VACANCIES IN THE OFFICE OF THE VICE PRESIDENT 13 (Comm. Print 1965).

for relieving the President and Vice President of constitutional uncertainty if the provisions must be used. Had the twenty-fifth amendment been in effect during President Garfield's illness, the Cabinet and Vice President Arthur probably would have used section 3. And President Eisenhower and Vice President Nixon possibly would have applied the same section during the brief period of the President's ileitis operation. But it is doubtful that sections 3 or 4 could have been used in the Wilson case, taking into account the President's intransigence, Vice President Marshall's doubts about his own capacities, and his distaste for conflict with the President. As for the heart attack and stroke episodes during the Eisenhower administrations, it is unlikely that section 3 of the current amendment would have been invoked in view of the President's team mode of operation, and the fact he could communicate with his staff during much of his indisposition. In Eisenhower's case those interested in the status quo gambled on minimum contact with the President and his eventual recovery, which gamble paid off. Had the international situation worsened or the illness become more severe and prolonged, the response might have been quite different.

Beyond these retrospective guesses about the use of the amendment, it is obvious that its application will depend on the nature of the inability, personality and political factors, and the relative intensity of domestic and international pressures on the Presidency.

If a vacancy in the Vice Presidency is in question under section 2, similar considerations will be operative, but at a different level of urgency. In all probability, the answer to whether and when a President will move to fill a vacancy in the Vice Presidency will turn on such considerations as the past health of the President, the degree of potential antagonism toward the President by Congress, the gravity of the prevalent domestic and international crises at the time, and the proximity of the next election. Such a decision will be further complicated by considerations related to the nature of the Vice Presidency itself. The powers of the Vice President are contingent,⁶⁹ and therefore the President will desire to fill a vacancy to avoid great disruption of important administrative and political balances. On the other hand, the very contingency of the Vice President's assumption of real power may encourage delay in filling a vacancy, when ranged against the more dramatic and pressing presidential priorities. Moreover, the President derives great power from holding the choice of a Vice Presidential nominee in abeyance. Con-

⁶⁹ As Vice President John Adams remarked, "I am possessed of two separate powers, the one in *esse* and the other in *posse*. I am Vice President. In this I am nothing, but I may be everything." ROSSITER, *THE AMERICAN PRESIDENCY* 137 (1960).

sequently, although section 2 of the amendment is designed to achieve speedy presidential action, perhaps only if a President is in good health, has a questionable congressional majority and another term in office, and faces a relatively calm domestic and international situation, will he be inclined to use section 2. But beyond saying that such factors inevitably will be present, prediction is impossible. All that can be stated for sure is that the amendment provides an orderly means for filling a constitutional vacuum if the President decides to act.

Predictions about sections 3 and 4 are even more difficult, although certain observations should be made. Under section 3, if the President declares a state of inability related either to terminal illness or to a temporary, minor inability, the amendment has a good chance of working without disruptive side effects. The President will have based his choice either on necessity or on preference; in the one case his designate will be accountable to the Constitution, but in the other case to the President. One can envision Robert Taft, had he been elected President in 1948, delegating the powers and the duties of his office to his Vice President in the final days before his death by cancer, or, similarly, had the prognosis darkened, President Eisenhower doing the same in the early hours of his heart attack.⁷⁰ At the other extreme is temporary designation of the Vice President as Acting President while a President is under anesthesia. All other options except one—that is, if the President is completely paralyzed or unable to communicate or unarguably psychotic—present troublesome difficulties. It is when the illness is obscure or its severity and duration are unknown, or when the President himself is uncertain about his condition, that the amendment will be put to the test. It is quite possible that under such circumstances the amendment will not even be used. Some will try to dissuade the President from declaring his inability, and unilateral action by the Vice President and the Cabinet will create so much uncertainty that conflict almost surely will arise. Without a clear presidential declaration of inability (and even in that case conflict will not be absent) an Olympian atmosphere of rational detachment would be required by all whose influence is enhanced or displaced if power is to be transferred without serious dissention. If Congress becomes directly involved the hubbub will increase. The terms “majority of the Cabinet” and “two-thirds vote of both Houses of Congress” do not guaranty an orderly transfer of power. Pressure on the Vice President will be especially great if he must assist in the decision

⁷⁰ President Eisenhower gave serious thought to this matter immediately before a hopeful upturn in his condition after his heart attack. ADAMS 192.

to declare or not declare the President's inability; perhaps he and the others whose interests are involved will select a compromise arrangement favoring an appearance of things as they are.

Thus neither section 3 nor section 4 are likely to be used except in the clearest situations. Even under conditions calling for application of section 3, the President likely will seek special understandings with his staff and the Vice President rather than invoke the amendment formally; in situations in which section 4 was intended to cover, the leadership in the executive branch probably will try to cover up differences while relying on a subsystem of *ad hoc* arrangements to carry on governmental functions until the President dies, recovers, or until his term expires. Failure of these pragmatic adjustments will leave the amendment a frail set of ground rules for struggle in a larger arena.

In sum, each case of presidential inability will impose its own set of imperatives and inhibitions on the President and the Vice President alike. Among the many variables in each case will be the relative urgency of international and domestic problems, the ambition and self-restraint of the political actors, and the nature of the President's inability. In a word, the amendment is only technically self-executing. Nonetheless, it contains all that a constitutional device should: a set of presumptions about the process of exercising power and an implicit expectation that it will be applied in a mood of restraint. Once the amendment is ratified a Vice President will know that he has a constitutional obligation to seek support if deterioration of the President's health threatens the political order. Moreover, a President will know that a temporary declaration of inability is an accepted condition under the Constitution and that if he so declares, a Vice President will be available during this period to exercise the executive prerogatives without drawing into question his constitutional authority. However difficult the amendment may be to apply, its greatest service is in making at least this much certain.

APPENDIX A

TABLE I
Vice Presidential Succession to the Presidency

Vice President Succeeding to the Presidency	President	Term They Completed	Years Served
John Tyler	Harrison	Apr. 6, 1841-Mar. 3, 1845	3.91 yrs.
Millard Fillmore	Taylor	July 10, 1850-Mar. 3, 1853	2.65
Andrew Johnson	Lincoln	Apr. 15, 1865-Mar. 3, 1869	3.88
Chester A. Arthur	Garfield	Sept. 20, 1881-Mar. 3, 1885	3.45
Theodore Roosevelt*	McKinley	Sept. 14, 1901-Mar. 3, 1905	3.47
Calvin Coolidge*	Harding	Aug. 3, 1923-Mar. 3, 1925	1.58
Harry S. Truman*	Roosevelt	Apr. 12, 1945-Jan. 20, 1949	3.77
Lyndon B. Johnson*	Kennedy	Nov. 22, 1963-Jan. 20, 1965	1.16

TOTAL 23.87 yrs.

* Vice Presidents who have succeeded to the Presidency as a result of a President's death and who have in turn been elected to the office of President for a 4-year term.

TABLE II
Periods Without A Vice President

Presi- dential Admin- istration	Vice President Succeeding to the Presidency	Period Office of Vice President was Vacant	Years Vacant
Madison	George Clinton ¹	Apr. 20, 1812-Mar. 3, 1813	0.88 yrs.
Madison	Elbridge Gerry ¹	Nov. 23, 1814-Mar. 3, 1817	2.28
Jackson	John C. Calhoun ²	Dec. 28, 1832-Mar. 3, 1833	0.18
Harrison	John Tyler ³	Apr. 6, 1841-Mar. 3, 1845	3.91
Taylor	Millard Fillmore ³	July 10, 1850-Mar. 3, 1853	2.65
Pierce	William R. King ¹	Apr. 18, 1853-Mar. 3, 1857	3.88
Lincoln	Andrew Johnson ³	Apr. 15, 1865-Mar. 3, 1869	3.89
Grant	Henry Wilson ¹	Nov. 22, 1875-Mar. 3, 1877	1.28
Garfield	Chester A. Arthur ³	Sept. 20, 1881-Mar. 3, 1885	3.45
Cleveland	Thomas A. Hendricks ¹	Nov. 25, 1885-Mar. 3, 1889	3.28
McKinley	Garret A. Hobart ¹	Nov. 21, 1899-Mar. 3, 1901	1.28
McKinley	Theodore Roosevelt ³	Sept. 14, 1901-Mar. 3, 1905	3.47
Taft	James S. Sherman ¹	Oct. 30, 1912-Mar. 3, 1913	0.34
Harding	Calvin Coolidge ³	Aug. 3, 1923-Mar. 3, 1925	1.58
Roosevelt	Harry S. Truman ³	Apr. 12, 1945-Jan. 20, 1949	3.77
Kennedy	Lyndon B. Johnson ³	Nov. 22, 1963-Jan. 20, 1965	1.16

TOTAL 37.28 yrs.

¹ Vice Presidents who died in office.

² Vice Presidents who resigned.

³ Vice Presidents who succeeded to the Presidency.

TABLE III
Periods of Critical Presidential Illness or Inability*

President	Term	Length of Illness or Inability
William Henry Harrison	Mar. 4, 1841-Apr. 4, 1841	7 days
Zachary Taylor	Mar. 4, 1849-July 9, 1850	5 days
Abraham Lincoln	Mar. 4, 1861-Apr. 15, 1865	9 hours
James A. Garfield	Mar. 4, 1881-Sept. 19, 1881	80 days
Grover Cleveland	Mar. 4, 1893-Mar. 3, 1897	5 days
William McKinley	Mar. 4, 1897-Sept. 14, 1901	8 days
Woodrow Wilson	Mar. 4, 1913-Mar. 3, 1921	280 days
Warren G. Harding	Mar. 4, 1921-Aug. 2, 1923	4 days
Franklin D. Roosevelt	Mar. 4, 1933-Apr. 12, 1945	2 hours
Dwight D. Eisenhower	Jan. 20, 1953-Jan. 19, 1961	143 days
		2 hours
Lyndon B. Johnson	Nov. 22, 1963-	13 days

* Source: FEERICK; HANSEN.

TABLE IV
Presidential Assassinations, and Near Misses

James Madison (nearly captured, war of 1812) ¹
Andrew Jackson (attempted assassination, 1835) ²
John Tyler (near miss, explosion on U.S.S. Princeton, 1844) ³
Abraham Lincoln (near misses, Fort Stevens, 1864) ⁴
Abraham Lincoln (assassination, 1865)
James Garfield (assassination, 1881)
William McKinley (assassination, 1901)
Franklin D. Roosevelt (attempted assassination, 1933) ⁵
Harry S. Truman (attempted assassination, 1950) ⁶
John F. Kennedy (assassination, 1963) ⁷

¹ He was accused of fleeing to safety. BRANT, JAMES MADISON: COMMANDER IN CHIEF 291-308 (1961).

² JAMES, ANDREW JACKSON, PORTRAIT OF A PRESIDENT 390-91 (1937).

³ FEERICK 97.

⁴ 3 SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 142-43 (1939).

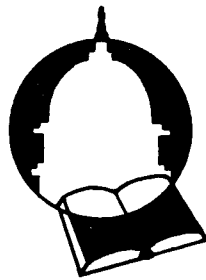
⁵ SCHLESINGER, THE CRISIS OF THE OLD ORDER 466 (1958).

⁶ FEERICK 202.

⁷ For observations on the "Presidential assassination syndrome" in mental patients, see *New York Times*, March 21, 1965, p. 66, col. 1.

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PRESIDENTIAL CONTINUITY AND
VICE PRESIDENTIAL VACANCY AMENDMENT



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PRESIDENTIAL CONTINUITY AND
VICE PRESIDENTIAL VACANCY AMENDMENT

Introduction

At least three times in our history, during the administrations of Garfield, who lay in the twilight zone between life and death for eighty days before succumbing to an assassin's bullet, Wilson who, after suffering a stroke, spent the last eighteen months of his term in a state of at least semi-invalidism, and Eisenhower who had three separate and serious illnesses, the President of the United States, for varying periods, has been unable to carry out the duties of his office. Although the Constitution provides that when a President is disabled the Vice President shall take over, it does this in language so ambiguous that there is disagreement about whether the Vice President becomes President for the balance of the term or simply acts as President until the disability is ended. Moreover, no specific method is set forth for determining when presidential inability begins or ends. Nor is the responsibility for making such determination clearly spelled out.

Despite the virtual unanimity of informed contemporary opinion that existing law empowers the Vice President to make the determination that a President is disabled and thereafter to assume the powers and duties of the presidential office until the inability is ended, no Vice President has ever done so. Historical precedents as well as the weight of informed opinion are inclined toward the conclusion that no Vice President will act until the constitutional ambiguities have been removed. The cries for a solution to the problem have intensified as

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Americans have apprehended the dread possibility of a nation immobilized in a moment of maximum peril because there might be neither a fit President nor someone unquestionably authorized to act in his stead.

Following his third illness, President Eisenhower attempted to fill in some of the constitutional gaps by entering into a working agreement with Vice President Nixon. The terms of the agreement provided that whenever the President informed the Vice President that he was unable to act the Vice President would assume the powers and duties of the presidential office until the inability had ended. If, however, the President were unable to communicate the existence of his inability, the Vice President would assume the duties of the office after such consultation as seemed to him appropriate under the circumstances. In either case the President, himself, would determine when the inability had ended and at that time resume the powers and duties of his office. Similar agreements were made between President Kennedy and Vice President Johnson and between President Johnson and Speaker McCormack who was next in line of succession until the inauguration of Vice President-elect Humphrey. A similar agreement also exists between President Johnson and Vice President Humphrey.

There has been general agreement that however valuable these working agreements might be nothing short of an amendment to the Constitution will give the person who assumes the duties of the presidential office the air of legitimacy so indispensable to their successful execution.

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Furthermore, although three Attorneys General have expressed the view that these agreements are "consistent with the correct interpretation of . . . the Constitution" their legal standing continues to present a nagging question. ^{1/} Since the Supreme Court does not render advisory opinions it is extremely doubtful that the matter could ever be resolved in advance of the crisis. Not until the assassination of President Kennedy, however, had there been anything approaching a consensus on precisely what the amendment to the Constitution should provide. That consensus was embodied in the resolution proposed by the 89th Congress.

This report will outline the nature of the constitutional problem and examine the legislative history and analyze the amendment.

Statement of the Problem(s)

Article II, section 1, clause 6 of the Constitution now provides that--

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly. until the Disability be removed, or a President shall be elected.

Constitutional scholars have debated for many years the meaning of Article II, section 1, clause 6. The crux of the disability problem

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arises from the first clause, i.e., "In the Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office the Same shall devolve on the Vice President, . . ." The second clause relating to the congressional power has been implemented from time to time through the enactment of statutes setting forth the succession to the office of President in the event of the removal, death, resignation, or inability of both the President and Vice President. Although the latter clause also raises several problems of constitutional interpretation, these more properly relate to presidential succession and are outside the scope of this paper. 2/

Turning to the first clause, it will be noted that it outlines four situations in which the Vice President may be called upon to act as President. Three of these, namely, removal, death, and resignation, obviously contemplate the permanent exclusion of the President for the balance of his term. The source of the uncertainty arises in connection with the fourth contingency, specifically, the "Inability to discharge the Powers and Duties of the said Office." Did the Framers intend such "inability" to permanently exclude the President, even in the event of recovery, from resuming the discharge of his powers and duties? Another question arises from the remaining language of the first clause which provides "the Same shall devolve on the Vice President." To what do the words "the Same" refer? In other words, what is it that

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"devolves" on the Vice President? Is it the "Office" of the President or the presidential "Powers and Duties"? If the former interpretation prevails, the contingency of inability like the other three would operate to effect a permanent exclusion. However, if the latter interpretation prevails, the powers and duties would once again attach to the office upon the President's recovery.

Historical investigation and the weight of constitutional authority tend to support the conclusion that under Article II, section 1, clause 6 of the Constitution the Vice President merely discharges the powers and duties of the Presidency during the President's inability. ^{3/} The sole dissenting voice in this otherwise harmonious picture springs from actual practice whereby Vice Presidents have become Presidents upon the latter's death. The precedent was established by John Tyler's succession upon the death of William Henry Harrison on April 4, 1841. In her authoritative volume, Presidential Succession, Ruth C. Silva describes these events, in part, as follows:

. . . The presidential office was vacant for the first time. It was then decided that in conformity with the Constitution, Vice President Tyler was to be the President for the remaining three years and eleven months of Harrison's term. Exactly who made this decision is uncertain. Legend tells us that the precedent was established merely because Tyler claimed presidential status. The Cabinet had decided, so the story goes, that Mr. Tyler should be officially styled "Vice President of the United States, acting President." But Tyler is supposed to have promptly determined that he would enjoy all the dignities and honors which he assumed he had inherited. ^{4/}

Although objections were raised in Congress and in the press, Tyler's assumption established the precedent that when the presidential office is vacant, the Vice President becomes the President for the remainder of the term. ^{5/} As a consequence, on each of the eight occasions that the Vice President has assumed office because of the death of the President, he has taken the presidential oath. Notwithstanding that succession in these instances arose from one of the contingencies that contemplates a permanent exclusion, namely, death, they threw a cloud on a disabled President's claim to office upon full recovery.

These precedents combined with the ambiguities of Article II, section 1, clause 6 served to throttle any action in the event of a presidential crisis. Arthur, Garfield's Vice President, emphatically declined to take any steps whatsoever to assume the powers of the President. Vice President Marshall flatly refused to assume any of the powers of the presidency because of the constitutional uncertainty as to whether Wilson could resume his office when he recovered.

Adding to this already highly uncertain situation was the recurrent and troubling problem of vice presidential vacancy. Between the years 1787 and 1965, eight Presidents died in office. ^{6/} Seven Vice Presidents also died in office and one resigned. ^{7/} As a result of these occurrences, the nation has been without a Vice President more than twenty percent of the time during its history.

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It became apparent that in order to adequately correct the flaws in our constitutional system it was necessary to accomplish the following objectives:

(1) To establish once and for all that the Vice President assumes the presidential office upon removal from office, death, or resignation of the President;

(2) To provide that in the event of the fourth contingency, namely, inability, the Vice President shall exercise the powers and duties of the office of President;

(3) To establish the procedure for determining the existence of an inability and its termination; and

(4) To provide for filling a vacancy occurring in the Vice Presidency.

Legislative History

After more than eighty years of study by congressional committees, attorneys general, constitutional experts and bar association committees, the Congress, in the dying moments of 1963, began to act on a presidential continuity amendment. Sparked by the assassination of President Kennedy which alerted the American people as never before to the dangerous constitutional void, hearings were scheduled for early 1964. 8/ Even as the nation mourned the loss of the President many thoughts were troubled by the prospect of the political crisis which

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might have followed had the fallen leader lingered on in hopeless and permanent incapacity. "As distasteful as it is to entertain the thought, a matter of inches spelled the difference between the painless death of John F. Kennedy and the possibility of his permanent incapacity to exercise the duties of the highest office of the land." ^{9/} Also, the record of Vice President Johnson's prior heart attack and advanced ages of the two immediate successors doubtless contributed to the general desire for a prompt solution.

A proposed constitutional amendment designed to solve the problem was introduced by Senator Birch Bayh, Chairman, Subcommittee on Constitutional Amendments, Committee on the Judiciary, U.S. Senate. ^{10/} The resolution was favorably reported on August 13, 1964, ^{11/} and passed the Senate on September 29, 1964. ^{12/} Congress adjourned before the House of Representatives had taken any action on the measure.

Similar proposals were introduced in the opening days of the 89th Congress by Senator Bayh and Congressman Celler. ^{13/} On January 28, President Johnson lent his support and urged prompt passage of the resolution. In broad outline, these resolutions provided that upon the removal, death, or resignation of a President, the Vice President would become President. It would require a President to nominate a person who meets the constitutional qualifications to be a Vice President whenever a vacancy occurred in that office. The nominee would take office as Vice President once he had been confirmed by a majority vote of both Houses of the Congress.

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The remainder of the resolution spelled out the procedure for determining the commencement and termination of presidential inability. It made clear that the President could declare his inability in writing and that upon such an occurrence the Vice President would become acting President. However, if a President did not declare the existence of his inability, the Vice President, if satisfied that the President was disabled would, with the written approval of a majority of the Cabinet, assume the discharge of the powers and duties of the office as acting President upon the transmission of such declaration to the Congress.

Finally, the resolution would permit the President to resume the powers and duties of the office upon his transmission to the Congress of his written declaration that no inability existed. However, if the Vice President and a majority of the Cabinet felt that the President was unable, they could prevent the President from resuming the powers and duties of the office by transmitting their written declaration so stating to the Congress. At this point the proposal recommended that the Congress make the final determination on the existence of inability. If the Congress determined by a two-thirds vote of both Houses that the President was unable, then the Vice President would continue as acting President. However, if the Congress failed in any manner to cast a vote of two-thirds or more in both Houses supporting the position that the President was unable to perform the powers and duties of his office,

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then the President would resume the powers and duties of the office.

The Senate Judiciary Committee submitted a favorable report on an amended resolution on February 10, 1965. ^{14/} The Committee version contained a number of language changes in two of the three sections which embraced the procedures for determining the commencement and termination of presidential inability. Section 4, dealing with the factual determination of inability when the President does not make a declaration to that effect, was entirely rewritten. The purpose of these amendments was explained as follows:

The text of Senate Joint Resolution 1, as introduced, requires, under certain contingencies, for a written declaration to be made by the President, under section 3, and by the Vice President and principal officers of the executive departments under section 4, and by the President, the Vice President and principal officers of the executive departments under section 5. It is the intention of the committee that for the best interests of the country to be served, notice by all parties should be public notice. The committee feels that notice by transmittal to the President of the Senate and the Speaker of the House of Representatives guarantees notice to the entire country.

The committee is concerned about the possibility that such written declaration might be transmitted during a period in which Congress was not in session. In this event the committee feels that transmittal of such written declaration to the presiding officers of both Houses, the President of the Senate and the Speaker of the House of Representatives, would be sufficient transmittal under the terms of this amendment.

It is the opinion of the committee that, under the language of section 5, Congress is empowered to reconvene in special session to consider any disability question arising under this section. Furthermore, under the language of this section, the President of the Senate and the Speaker of the House of Representatives would be required to call a

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special session of the Congress to consider the question of presidential inability whenever the President's ability to perform the powers and duties of his office are questioned under the terms of section 5. However, nothing contained in this proposed amendment should be construed to limit the power of the President from exercising his existing constitutional authority to call for a special session of the Congress.

It is further understood by the committee that should the President of the Senate and the Speaker of the House of Representatives not be found in their offices at the time the declaration was transmitted that transmittal to the office of such presiding officers would suffice for sufficient notice under the terms of this amendment.

It is the judgment of the committee that the language "principal officers of the executive departments" more adequately conveys the intended meaning of sections 4 and 5, that only those members of the President's official Cabinet were to participate in any decision of disability referred to under these sections. This language finds precedent under article II, section 2, clause 1, of the Constitution. The pertinent language there reads as follows:

he may require the Opinion, in writing, of the principal Officer in each of the executive Departments,

In its discussion of the ramifications of section 5, the committee considered it important to add additional stress to the interpretation of two questions which might arise:

(1) Who has the powers and duties of the office of the President while the provisions of section 5 are being implemented?

(2) Under what sense of urgency is Congress required to act in carrying out provisions of this section?

Under the terms of section 3 a President who voluntarily transfers his powers and duties to the Vice President may resume these powers and duties by making a written declaration of his ability to perform the powers and duties of his office and transmitting such declaration to the President of the Senate and the Speaker of the House of Representatives. This will reduce the reluctance of the President to utilize the provisions of this section in the event he fears it would be difficult for him to regain his powers and duties once he has voluntarily relinquished them.

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However, the intent of section 5 is that the Vice President is to continue to exercise the powers and duties of the office of Acting President until a determination on the President's inability is made by Congress. It is also the intention of the committee that the Congress should act swiftly in making this determination, but with sufficient opportunity to gather whatever evidence it determined necessary to make such a final determination. The language, as amended, reads as follows:

Thereupon Congress shall immediately proceed to decide the issue.

It was the opinion of the committee that the words "Thereupon", "shall", and "immediately" were sufficiently strong to indicate the necessity for prompt action.

Precedence for the use of the word "immediately" and the interpretation thereof may be found in the use of this same word, "immediately" in the 12th Amendment to the Constitution. In the 12th amendment, in the event no candidate for President receives a majority of electoral votes, the House of Representatives "shall choose immediately,". The committee was of the opinion that the same sense of urgency attendant to the use of the word "immediately" in the 12th amendment when Congress was in fact deciding who would be the President of the United States should be attendant in proceedings in which the Congress was deciding whether the President of the United States should be removed from his office because of his inability to perform the powers and duties thereof.

The committee is concerned that congressional action under the terms of section 5 should be taken under the greatest sense of urgency. However, because of the complexities involved in determining different types of disability, it is felt unwise to prescribe any specific time limitation to congressional deliberation thereupon. Indeed, the committee feels that Congress should be permitted to collect all necessary evidence and to participate in the debate needed to make a considered judgment.

The discussion of the committee made it abundantly clear that the proceedings in the Congress prescribed in section 5 would be pursued under the rules prescribed, or to be prescribed, by the Congress itself. ^{15/}

On February 19 the Senate passed (72 - 0) and sent to the House a modified version of the resolution submitted by Senator Bayh. ^{16/}

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During debate on the measure the Senate adopted several amendments of a technical and corrective nature submitted by the Indiana Senator as well as the changes proposed by the Committee. ^{17/} Also adopted was an amendment proposed by Senator Hruska which would allow the Vice President seven days--rather than two--to communicate with the Congress in the event of a disagreement between him and the President concerning the termination of a disability. ^{18/} The Senator felt "that the two day period is insufficient for the Vice President and the members of the Cabinet to decide whether they want to raise the issue of the President's ability." ^{19/}

On March 24 the House Committee on the Judiciary favorably reported an amended version of the resolution submitted by Congressman Celler. ^{20/} As noted above, the latter was identical to the proposal originally introduced by Senator Bayh. The changes made in Committee were explained at length in its report on the measure.

The principal purpose of the amendment is to distinguish between inability voluntarily declared by the President himself and inability declared without his consent. In the former case, the President can resume his duties by making a simple declaration that the inability has ceased; in the latter, the measure provides procedures for promptly determining the presence or absence of inability when that issue is present.

The amendment makes no changes in sections 1 and 2 of the constitutional amendment proposed by House Joint Resolution 1 as introduced; it does make changes in sections 3 and 4 and it eliminates section 5 by merging the substance of that section with that of section 4.

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The changes made by the amendment in section 3 clarify the procedure and clarify the consequences when the President himself declares his inability to discharge the powers and duties of his office. There are two: First, the amendment indicates the officials to whom the President's written declaration of inability shall be transmitted, namely the President pro tempore of the Senate and the Speaker of the House of Representatives. The committee deemed it desirable to add this specification which was absent from the joint resolution as introduced. Second, the amendment makes clear that, in case of such voluntary self-disqualification by the President, the President's subsequent transmittal to the same officials of a written declaration to the contrary, i.e., a written declaration that no inability exists, terminates the Vice President's exercise of the Presidential powers and duties, and that the President shall thereupon resume them. In short, it is the intent of the committee that voluntary self-disqualification by the President shall be terminated by the President's own declaration that no inability exists, without further ado. To permit the Vice President and the Cabinet to challenge such an assertion of recovery might discourage a President from voluntarily relinquishing his powers in case of illness. The right of challenge would be reserved for cases in which the Vice President and Cabinet, without the President's consent, had found him unable to discharge his powers and duties.

Sections 4 and 5 of the amendment proposed by House Joint Resolution 1, as introduced, dealt respectively with the devolution upon the Vice President, as Acting President, of the President's powers and duties pursuant to a declaration of his inability made by the Vice President and other officials, and with the procedure upon subsequent declaration by the President that no inability exists.

The amendment places the substance of former section 5 into section 4, in order to emphasize the committee's intent that the procedure provided by former section 5 relates only to cases in which Presidential inability has been declared by others than the President. Two identical changes are made in former sections 4 and 5. First, the term "principal officers of the executive departments" is substituted for the term "heads of the executive departments" to make it clearer that only officials of Cabinet rank should participate in the decision as to whether presidential inability exists. The substituted language follows more closely article II, section 2, of the Constitution, which provides that the President may require the

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opinion in light "of the principal officers in each of the executive departments ***." The intent of the committee is that the Presidential appointees who direct the 10 executive departments named in 5 U.S.C. 1, or any executive department established in the future, generally considered to comprise the President's Cabinet, would participate, with the Vice President, in determining inability. In case of the death, resignation, absence, or sickness of the head of any executive department, the acting head of the department would be authorized to participate in a presidential inability determination.

The second change made in former sections 4 and 5 is to specify the President pro tempore of the Senate and the Speaker of the House of Representatives as the congressional officials to whom declaration concerning Presidential inability shall be transmitted, as is done in section 3.

The language of former section 5 of the House Joint Resolution 1 is further amended to make clear that if Congress is not in session at the time of receipt by the President pro tempore of the Senate and the Speaker of the House of Representatives of a written declaration by the Vice President and a majority of the principal officers of the executive departments contradicting a Presidential declaration that no inability exists, Congress shall immediately assemble for the purpose of deciding the issue. Finally, the language of former section 5 is further amended by providing that in such event the President shall resume the powers and duties of his office unless the Congress within 10 days after receipt of such declaration of Presidential inability determines by two-thirds vote of both Houses that the President is in fact unable to discharge the powers and duties of his office.

The committee deems it essential in the interest of stability of government to limit to the smallest possible period the time during which the vital issue of the executive power can remain in doubt. Under the bill, following a Presidential declaration that the disability previously declared by others no longer exists, a challenge to such declaration must be made within 2 days of its receipt by the heads of the Houses of Congress and must be finally determined within the following 10 days. Otherwise the President, having declared himself able, will resume his powers and duties. An unlimited power in Congress might afford an irresistible temptation to temporize with respect to restoring the President's powers. In this highly charged area there is no room for equivocation or delay. 21/

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As reported by the House Committee, the resolution differed from the Senate-passed version in three major particulars. First, it spelled out more clearly that the Vice President would discharge the powers and duties of a President who voluntarily declared his own inability only until the President transmitted to Congress a written declaration stating that his inability had terminated. Second, it reinstated the two day limitation (rather than seven days) during which the Vice President and a majority of the Cabinet might challenge a President's contention that his inability had ended. Third, it provided that in the event of disagreement between the President and Vice President and a majority of the Cabinet over the termination of presidential inability, Congress, if not in session, would immediately assemble to decide the issue within ten days. The Senate-passed version provided only that Congress would "immediately proceed to decide" the issue.

On April 13, 1965, the House passed the amended version by a vote of 368 to 29. ^{22/} Following passage, the House substituted the text of its resolution for that passed by the Senate. ^{23/} The only amendment adopted on the floor was a proposal by Congressman Poff providing that Congress, if not in session, shall assemble "within 48 hours" to decide a dispute between the President and Vice President over termination of presidential inability. ^{24/}

The tenor of the House debate was fairly well summarized by Congressman Celler who said:

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This is by no means, ladies and gentlemen, a perfect bill[1]. No bill can be perfect. Even the sun has its spots. The world of actuality permits us to attain no perfection. Admirable as is our own Constitution, it had to be amended 24 times. But nonetheless, this bill has a minimum of drawbacks. It is well-rounded, sensible, and efficient approach toward a solution of a perplexing problem--a problem that has baffled us for over 100 years.

As to attaining perfection, let me call your attention to a very pertinent remarks (sic) made by Walter Lippman in the New York Herald Tribune of June 9, 1964, when he referred to this proposed amendment. He said:

It is a great deal better than an endless search for the absolutely perfect solution, which will never be found and, indeed, is not necessary.

As was said by the distinguished former Attorney General of the United States, the honorable Herbert Brownell--I commend his words indeed to the gentleman from Ohio [Mr. Brown]--speaking for himself and speaking for the American Bar Association:

Certainty and prompt action are *** built into this proposal--namely, House Joint Resolution 1. *** During the 10-year debate on presidential disability *** many plans have been advanced to have the existence of disability decided by different types of commissions or medical experts, by the Supreme Court, or by other complicated ad hoc procedures. But upon analysis *** they all have the same fatal flaw *** they would be time consuming and divisive.

We tried to avoid freighting down this amendment with too much detail. We leave that to supplementing, implementing legislation. We make the provisions as simple yet as comprehensive as possible.

This is certain: we have trifled with fate long enough on this question of presidential inability. We in the United States have been lucky, but luck does not last forever. The one sure thing about luck is that it is bound to change.

Sir Thomas Brown once said:

Court not felicity too far and weary not the favorable hand of fortune.

We can no longer delay. Delay is the art of keeping up with yesterday. We must keep abreast of tomorrow. Let us stop playing presidential inability roulette. Let us pass this measure. . . . 25/

The House on June 30, 1965, by voice vote and with little debate, adopted the conference report embodying the compromised version of the resolution. 26/

The Senate the same day debated the conference report but deferred action on it until July 6 to allow further debate after Senators Gore, Kennedy (N.Y.) and McCarthy raised a question concerning the provision allowing the Vice President "and a majority of either the principal officers of the executive departments or such other body as Congress may by law provide" to declare the President disabled. 27/ Senator Gore expressed concern that the words "either" and "or" might give rise to a situation in which the Vice President and a majority of the Cabinet, and a body which Congress might establish, would both claim the authority to exercise the function. Senator Bayh explained that this language was intended to mean "either one or the other." 28/

On July 6, the Senate, by a vote of 68 to 5, adopted the conference report on the resolution. 29/ During the debate Senator Gore renewed his objections to the proposal which he said would lead to the potentially disastrous spectacle of competing claims to the Presidency. Senator Bayh, supported by Senator Ervin, argued that the proposal was the very best obtainable in the Congress of the United States.

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As reported from conference and approved by both Houses the resolution contained a number of changes from the earlier passed versions. These changes were explained by Senator Bayh as follows:

The conference report, which has now been approved by the House of Representatives, contains certain changes from the proposal which the Senate approved earlier this year by a vote of 72 to 0. I should like to describe those changes and then urge approval of the conference report by this body.

In the Senate version of the measure we prescribed that all declarations concerning the inability of the President or of his ability to perform the powers and duties of that office, particularly a declaration concerning his readiness to resume the powers and duties of his office made by the President of the United States himself, be transmitted to the Speaker of the House and to the President of the Senate.

The conference committee report proposes that those declarations go to the Speaker and to the President pro tempore of the Senate. The reason for the change is, of course, that the Vice President, who is also the President of the Senate, would be participating in making a declaration of presidential inability, and therefore would be unable to transmit his own declaration to himself. In addition, I believe that we would be on better legal ground not to send the declaration to a party in interest. The Vice President, who would be shortly assuming or seeking to assume the powers and duties of the office, would indeed be a party in interest.

In the Senate version of the bill we did not specify that if the President were to surrender his powers and duties voluntarily--and I emphasize the word "voluntarily"--he could resume them immediately upon declaring that his inability no longer existed. We believe that our language clearly implied this. Certainly the intention was made clear in the debate on the question on the floor of the Senate and in the record of our committee hearings, but the Attorney General of the United States requested that we be more specific on this point so as to encourage a President to make a voluntary declaration to the effect that he was unable to perform the powers and duties of the office, if it was necessary for him to do so.

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We made that point clear in the conference committee report.

We added specific language enabling the President to resume his powers and duties immediately, with no waiting period, if he had given up his powers and duties by voluntary declaration.

That had been the intention of the Senate all along, as I recall the colloquy which took place on the floor of the Senate; and we had no objection to making that intention crystal clear in the wording of the proposed constitutional amendment itself.

In the Senate version we prescribed that the President, having been divested of his powers and duties by declaration of the Vice President and a majority of the Cabinet, or such other body as Congress by law may provide, could resume the powers and duties of the office of President upon his declaration that no inability existed, unless within 7 days the Vice President and a majority of the Cabinet, or such other body issued a declaration challenging the President's intention. The House version prescribed that the waiting period be 2 days. The conference compromised on 4 days, and I urge the Senate to accept that as a reasonable compromise between the time limits imposed by the two bodies.

Furthermore, we have clarified language, at the request of the Senate conferees, to make crystal clear that the Vice President must be party to any action declaring the President unable to perform his powers and duties.

I remember well the words of President Eisenhower, before the American Bar Association conference, when he said that it is a constitutional obligation of the Vice President to help make these decisions. We in the Senate felt that to be the case, and thus changed the language a bit to make it specifically clear.

That, I am sure, had been the intention of both the Senate and the House, but we felt that the language was not specific enough, so we clarified it on that point.

The Senate conferees accepted a House amendment requiring the Congress to convene within 48 hours, if they were not then in session, and if the Vice President and a majority of the Cabinet or the other body were to challenge the President's declaration that he, the Chief Executive, were not disabled or, once again, able to perform the powers and duties of his office.

We feel that the requirement would encourage speedy disposition of the question by the Congress, and I urge its acceptance by the Senate.

Finally, the Senate version imposed longtime limitations upon the Congress to settle a dispute as to whether the President or the Vice President could perform the powers and duties

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of the office of President. Senators know the question would come to the Congress only if the Vice President, who would then be acting as President, were to challenge, in conjunction with a majority of the Cabinet, the President's declaration that no inability existed. The House version imposed a 10-day time limitation. The Senate conferees were willing to have a time limitation as a further safeguard to the President, but we were unanimous in agreeing that 10 days was too short a period in which to decide on that grave a question.

The conferees finally agreed to a 21-day time limitation after which, if the Vice President had failed to win the support of two-thirds of both the Houses of Congress, the President would automatically return to the powers and duties of his office. I urge the Senate to accept that change.

I should like to specify one thing further about this particular point since I feel it is the main point of contention between the House and the Senate, and one upon which I was happy to see we could find some agreements.

First, including a time limitation in the Constitution of the United States would impose upon those who come after us in this great body a limitation on their discussions and deliberation when surrounded by contingencies which we cannot foresee. The Senate conferees felt that a 10-day time limitation was too short a period.

Our feeling in the Senate, as represented by the views of the conferees, was that we should go slowly in imposing a maximum time limitation if we could not foresee the contingencies that might confront those who were forced to make their determination as to who would be the President of the United States. I believe 21 days is a reasonable time. I emphasize that it is our feeling that this is not necessarily an absolute period. The 21 days need not always be used. In my estimation, most decisions would be made in a shorter time. But if the Nation were involved in a war or other international crisis, and the President suffered an illness whose diagnosis might be difficult, a longer time might be needed, and the maximum of 21 days that was agreed upon might be required.

It should be made clear that if during the 21-day limit one House of Congress, either the Senate or the House of Representatives, voted on the issue as to whether the President was unable to perform his powers and duties, but failed to obtain the necessary two-thirds majority to sustain the position of the Vice President and the Cabinet, or whatever other body Congress in its wisdom might prescribe at some future date, the issue would be decided in favor of the President. In other

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words, if one House voted but failed to get the necessary two-thirds majority. the other House would be precluded from using the 21 days and the President would immediately reassume the powers and duties of his office. 30/

25th Amendment Summarized

The amendment proposed to the States by the 89th Congress meets the four basic objectives noted earlier. It affirms the historical practice by which a Vice President has become President upon the death of the President, further extending the practice to the contingencies of resignation or removal from office. In order to assure that the second highest office will always be occupied, it requires the President to nominate a person to be Vice President whenever there is a vacancy in that office. The nominee is to take office as Vice President upon confirmation by a majority in both Houses of Congress.

The proposal permits the President to declare himself disabled and to declare the end of his disability. The declarations are to be reduced to writing and transmitted to the Speaker of the House of Representatives and the President pro tempore of the Senate. In the interim, the Vice President becomes Acting President. If a President does not declare the existence of his inability, the Vice President and a majority of the "principal officers of the executive departments" may declare the President disabled by transmitting their written declaration to this effect to the presiding legislative officers of

the House and Senate. In such an event the Vice President is to undertake the discharge of the presidential powers and duties as Acting President. If for any reason the Cabinet proves not to be a workable instrument in this matter, Congress is empowered to set up another body to work with the Vice President.

"Thereafter" the President may announce his own recovery and "resume the powers and duties of his office". However, if the Vice President and a majority of the Cabinet disagree with the President, they have four days to send a written declaration of the fact to the Speaker and the President pro tempore. At this point the Congress is responsible for a final decision. If Congress is not in session, it would have to assemble within forty-eight hours of receipt of the declaration. From the time of receipt Congress has twenty-one days in which to decide the issue. Pending the decision, the Vice President is to continue as Acting President. If Congress fails to arrive at a decision, or if more than one-third of the membership of either House sides with the President, the President is to resume his powers and duties. If two-thirds of the membership of each House support the Vice President and the Cabinet, the Vice President is to continue as Acting President.

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Footnotes

- 1/ 42 Op. Atty. Gen. No. 5 (1961), as reproduced in Hearings before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary, United States Senate, 88th Cong., 1st Sess., on S. J. Res. 28, S. J. Res. 35 and S. J. Res. 84 (1963).
- 2/ The principal issue arising from the second clause concerns the legal propriety of placing legislative officers in the order of presidential succession. Despite the inclusion of such persons in two of the three succession laws passed by Congress--including that currently in effect--debate on the matter continues unabated. The specific points at issue are (1) whether the Speaker and the President pro tempore are "officers" in the sense of Article II, section 1, clause 6; (2) whether a legislative officer (named to act as President) who resigns his office thereafter is eligible to act as President; and (3) whether it violates the constitutional principle of separation of powers for a Member of Congress to act as President. See Celada, Presidential Succession: A Recurrent Problem, pp. 21-30 (1963) (L.R.S. Multilith Report).
- 3/ 42 Op. Atty. Gen., supra, note 1 at 89-96:

1. The records and history of the Constitutional Convention.

Without dispute, Article II, section 1, clause 6 nowhere expressly provides that the Vice President shall under any circumstances become President. Had the framers of the Constitution intended the Vice President in certain contingencies to become President, they would not have been at a loss for words. Reference to the records of the Constitutional Convention discloses that the framers of the Constitution never intended the Vice President in event of Presidential inability to be anything but an acting President while the inability continued.

Of the various written plans submitted for consideration at the Convention, only Charles Pinckney's draft offered May 29, 1787, specifically referred to Presidential disability. Article VIII of this draft provided in part that in case of the President's removal through impeachment, death, resignation or disability "the President of the Senate shall exercise the duties of his office until another President be chosen * * *." ¹

The House resolved itself into a Committee of the Whole to consider various proposals, but having made little progress on

¹ 3 Max Farrand, The Records of the Federal Convention of 1787 (1911 Ed.), 600.

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the question of the President's inability, referred this proposal to the Committee of Detail which was then considering other matters. This Committee reported a draft on August 6, 1787, which contained Article X, section 2 relating to Presidential inability. It provided that in case of the President's removal as aforesaid through impeachment, death, resignation, or disability to discharge the powers and duties of his office, "the President of the Senate shall exercise those powers and duties, until another President of the United States be chosen, or until the disability of the President be removed."² On August 27, Mr. Dickinson remarked about the vagueness of this clause. "What," he said, "is the extent of the term 'disability' & who is to be the judge of it?" Unfortunately, his suggestion produced no clarification.³

It will be noted that up to this point the official to act as President until the President's disability was ended was "the President of the Senate," not the Vice President. Article X of the draft was then referred to the Committee of Eleven which reported on September 4. In its report provision was included for the first time for a Vice President, as distinguished from the President of the Senate⁴ who was to be ex officio, President of the Senate, except on two occasions: when the Senate sat in impeachment of the President, in which case the Chief Justice would preside, and "when he shall exercise the powers and duties of the President," in which case of his absence, the Senate would choose a President pro tempore. The Committee of Eleven also recommended that the latter part of section 2 of Article X be amended to provide that in case of the President's removal on impeachment, death, absence, resignation or inability to discharge the powers or duties of his office "the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed."⁵ He was not to become the President in either event.

On September 7, the Convention adopted an amendment to cover the vacancy or disability of both the President and Vice President providing that the Legislature may declare by law what officer of the United States shall act as President in such event, and "such Officer shall act accordingly, until such disability be removed, or a President shall be elected."⁶

² 2 id. 186.

³ 2 id. 427.

⁴ 2 id. 495.

⁵ 2 id. 495, 499.

⁶ 2 id. 532.

On September 8, the last clause of section 2, Article X was agreed to by the Convention, and a Committee of five was appointed "to revise the style and arrange the articles agreed to by the House" including those provisions dealing with inability.⁷ Thus, as the proposed article came to the Committee on Style, it consisted of two clauses dealing with Presidential succession. The first related to the devolution of the powers and duties of the President's office on the Vice President in certain cases including the President's inability. The second authorized Congress to designate an officer to act as President in cases in which both the President and Vice President were disabled, had died, resigned, or been removed. A temporal clause modified each main clause limiting the tenure of an acting President to the duration of the inability or until "another President be chosen" (first clause) or until "a President shall be elected" (second clause). Nothing in either clause said that the Vice President was to become President.

On September 12 the Committee on Style, condensing and combining the provision for Presidential inability, together with the provision for joint inability of both the President and Vice President, reported the clause as follows:⁸

"(e) In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the president and vice-president, declaring what officer shall then act as president, and such officer shall act accordingly, until the disability be removed, or the period for choosing another arrive."

Madison crossed out the words "the period for choosing another president arrive" and inserted in their place "a President shall be elected."⁹ In this form the clause was written into the final draft of the Constitution.

The Committee on Style had no authority to amend or alter the substance or meaning of the provisions, but merely to combine and integrate them as a matter of form.¹⁰ In this setting, the effect of what was done by it may be better understood by placing

⁷ Davis, Inability of the President, Sen. Doc. No. 308, 65th Cong., 3d sess. 10 (1918).

⁸ 2 Ferrand, op. cit. supra note 1, 598-599.

⁹ 2 id. 626. See also 2 id. 599.

¹⁰ Davis, op. cit. supra note 7, 11.

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the provisions originally agreed to by the Convention side by side with the clauses as they were adopted by the Convention.

"Articles Originally Agreed
to by the Convention

As Later Reported by Committee
on Style and Finally Adopted

Article X, section 2: * * *
and in case of removal as
aforesaid, death, absence,
resignation or inability to
discharge the powers or duties
of his office, the Vice Presi-
dent shall exercise those
powers and duties until an-
other President be chosen, or
until the inability of the
President be removed.

Article II, section 1, para-
graph 6: In case of the removal
of the President from office,
or of his death, resignation,
or inability to discharge the
powers and duties of the said
office, the same shall devolve
on the Vice President;

Article X, section 1: The Leg-
islature may declare by law
what officer of the United
States shall act as President,
in case of the death, resigna-
tion, or disability of the
President and Vice President;

and the Congress may by law
provide for the case of re-
moval, death, resignation or
inability, both of the Presi-
dent and Vice President, de-
claring what officer shall then
act as President;

and such Officer shall act
accordingly, until such dis-
ability be removed, or a Pres-
ident shall be elected.

and such officer shall act
accordingly, until the dis-
ability be removed, or a Pres-
ident shall be elected."

Comparison of these provisions makes clear the intention of the framers of the Constitution. When the provisions were placed into the hands of the Committee on Style and Arrangement, they explicitly provided that in case of inability of the President, the Vice President was not to become President, but merely to "exercise those powers and duties * * * until the inability of the President be removed." When, therefore, the Committee on Style condensed the language and reported the provision to read in case of the President's "inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President," the exact meaning intended by the Convention was carried over to the revised language.

It has been argued by one school of thought that "the Same" as used in the succession clause refers to "Office," and therefore the office devolves on the Vice President who thereby

becomes President. The other school asserts that "the Same" has reference to "Powers and Duties," and that the Vice President may merely discharge those powers and duties, but does not become President. Since a definitive answer is not to be found in any fixed rules of English usage, Professor Ruth C. Silva has concluded that the antecedent of "the Same" should be ascertained on the basis of the intention of those who framed and ratified the Convention. ¹¹ This is sound construction.

This interpretation is reinforced by other language initially agreed to by the Convention. If it were intended that the Vice President should act permanently as President, it seems unlikely that the language adopted by the Convention and sent to the Committee on Style would expressly prescribe a temporary period during which the Vice President shall exercise "those powers and duties," viz: "until another President be chosen, or until the inability of the President be removed."

When we refer to the provisions before and after the Committee on Style had combined them, it appears that the Committee did several things: consolidated the two provisions into one and introduced the words "the same shall devolve on the Vice President"; omitted reference to "absence" as an occasion for operation of the succession rule; used the adverbial clause "until the disability be removed," only once instead of using it to modify each of the preceding clauses separately; substituted "inability" for "disability" in the clause referring to succession beyond the Vice President, possibly as being more comprehensive and covering both absence and temporary physical disability; and changed the semicolon after "Vice President" to a comma so that the limiting clause beginning "and such Officer" would refer both to the Vice President and the officer designated by Congress. Thus the evolution of this clause makes clear that merely the powers and duties devolve on the Vice President, not the office itself.

2. The debates in the Convention and in the ratifying conventions.

The debates in the Convention are not too illuminating on the question whether a Vice President was merely to act as President until the latter's disability was over or to become President. In support of the view that the debates demonstrate recognition that the Vice President's role was to be a temporary one while the inability existed, statements relied on are not squarely in point, but the inferences drawn are entitled to weight.

Thus, Professor Silva states: ¹² " * * * This assumption [that the Vice President is an acting President] is implicit in James

¹¹ Silva, Presidential Succession 32 (1951).

¹² Id. 10.

Wilson's objections to the election of the President by Congress. The gentleman from Pennsylvania said that the Senate might prevent the filling of a vacancy by dilatory action, so that their own presiding officer could continue to exercise the executive function. Gouverneur Morris and James Madison likewise objected to this mode of election for a similar reason--the Senate might retard appointment of a President in order that its own presiding officer might continue to possess veto power. Such objections are without merit if the President's successor was intended to become President for the remainder of the term."

There is other evidence from which the intention of the delegates may be determined. Charles Warren reports that during the debates little enthusiasm was expressed for an officer such as the Vice President, that the discussion centered on his status as a legislative officer, and there was no discussion as to his succession even in case of the President's death.¹³ However, Warren is of the opinion "the delegates probably contemplated that * * * the Vice President would only perform the duties of President until a new election for President should be held; and that he would not ipso facto become President."¹⁴ It seems fairly clear that if the delegates did not contemplate that the Vice President shall become President on the death of the President, but only perform the duties of the office, that they certainly did not intend any different result upon the President's inability.

Discussion of the succession clause at the ratifying conventions was also singularly unenlightening.

Professor Silva, who has made a careful study of the matter, reports there is no record of discussion of the succession clause at the ratifying conventions except briefly at the Virginia Convention. George Mason objected to the clause because it lacked provision for the prompt election of another President in event of vacancy in both the Presidential and Vice-Presidential offices. Madison's attempt to answer this objection indicated that he did not think that the designated officer in event of succession beyond the Vice President "would have that tenure which the Constitution guarantees to a de jure President," but it does not appear that Madison had in mind the status of a Vice President who might be acting as President.¹⁵ What is of greater significance is that the delegates in the ratifying conventions always

¹³ Charles Warren, The Making of the Constitution, 634-635 (1928).

¹⁴ Id. at 635.

¹⁵ Silva, op. cit. supra note 11, 11.

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carefully distinguished between "the President" and "the acting President." Reference was made to "the Vice President, when acting as President," not "the Vice President when he becomes President." 16 Silva says that "nowhere in the debates of the ratifying conventions did a single one of the delegates use the latter expression." 17

The Federalist, in which Hamilton defended the proposed Constitution and explained in detail its provisions, is surprisingly silent as a whole on what was intended when a President suffers inability. However, at one point Hamilton defended the role of a Vice President over the objection that his position would be "superfluous, if not mischievous." He urged that two considerations justified the Vice President's position: one to cast the deciding vote in the Senate when they were equally divided; the other, that "the vice-president may occasionally become a substitute for the president * * *, and exercise the authorities and discharge the duties of the president." 18

While these debates in the Convention and ratifying conventions appear to be inconclusive, generally they tend to support the argument that a Vice President or designated officer was never, in the view of the framers of the Constitution, intended to become President. If there was Presidential inability, the Vice President was to act only until the inability was terminated. 19

4/ Ann Arbor, University of Michigan Press, 1951, at 14.

5/ Id., at 15-24.

6/ The eight Vice Presidents who succeeded to the Presidency were John Tyler (Harrison), Millard Fillmore (Taylor), Andrew Johnson (Lincoln), Chester A. Arthur (Garfield), Theodore Roosevelt (McKinley), Calvin Coolidge (Harding), Harry S. Truman (Roosevelt), and Lyndon B. Johnson (Kennedy).

7/ The seven Vice Presidents who died in office were George Clinton, Elbridge Gerry, William R. King, Henry Wilson, Thomas A. Hendricks, Garrett A. Hobart, and James Sherman. The only Vice President to have ever resigned was John C. Calhoun.

8/ Presidential Inability and Vacancies in the Office of Five President. Hearings before the Subcommittee on Constitutional Amendments of the Committee on the Judiciary. United States Senate, 88th Cong., 2d Sess., (1964).

9/ Id., at 22 (Senator Keating).

- 10/ S. J. Res. 139, 88th Cong., 1st Sess.
- 11/ S. Rept. No. 1382, 88th Cong., 2d Sess. (1964).
- 12/ 110 Cong. Rec. 23061 (1964).
- 13/ S. J. Res. 1, H. J. Res. 1, 89th Cong., 1st Sess.
- 14/ S. Rept. No. 66, 89th Cong., 1st Sess. (1965).
- 15/ Id., at 2-3.
- 16/ 111 Cong. Rec. 3203 (daily ed.).
- 17/ Id., at 3167-3168.
- 18/ Id., at 3194.
- 19/ Id., at 3192.
- 20/ H. Rept. No. 203, 89th Cong., 1st Sess. (1965).
- 21/ Id., at 2-3.
- 22/ 111 Cong. Rec. 7699 (daily ed. April 13, 1965).
- 23/ Id., at 7700.
- 24/ Id., at 7698.
- 25/ Id., at 7667-7668.
- 26/ 111 Cong. Rec. 14668 (daily ed. June 30, 1965). H. Rept. No. 564, 89th Cong., 1st Sess. (1965).
- 27/ 111 Cong. Rec. 14829-14832, 14833-14839 (daily ed. June 30, 1965).
- 28/ Id., at 14835.
- 29/ 111 Cong. Rec. 15031-15032 (daily ed. July 6, 1965).
- 30/ 111 Cong. Rec. 14830-14831 (daily ed. June 30, 1965).

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AppendixText of the 25th Amendment

JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States relating to succession to the Presidency and Vice Presidency and to cases where the President is unable to discharge the powers and duties of his office.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States within seven years from the date of its submission by the Congress:

"Article--

"Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.

"Sec. 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

"Sec. 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.

"Sec. 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.

"Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority

of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office."

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ADDENDUM TO THE REPORT OF DECEMBER 3, 1965,
PRESIDENTIAL CONTINUITY AND VICE PRESIDENTIAL
VACANCY AMENDMENT

The proposal to assure continuity of Presidential power in the case of disability was formally proclaimed the 25th Amendment at a White House ceremony on Thursday, February 23, 1967. Mr. Lawson Knott, Administrator, General Services Administration, signed the document certifying that the Amendment had been ratified in accordance with procedures set forth in Article V of the Constitution. President Johnson signed as a witness.

The Amendment, the subject of intensive study for almost a century, went into effect when Nevada became the 38th State to ratify. Although the joint congressional resolution containing the terms of the Amendment allowed seven years for completion of the ratification process, a scant 20 months had elapsed since its formal presentation to the States.

Briefly, the Amendment specifies the procedures to be followed when a President is disabled and authorizes a President to fill the office of Vice President if it becomes vacant.

President Johnson emphasized the importance of the 25th Amendment during the ceremonies of February 23. He said:

Twice in our history we have had serious and prolonged disabilities in the Presidency. Sixteen times in the history of the Republic the office of Vice President . . . has been vacant. [In this] crisis-ridden era there is no margin for delay, no possible justification for a vacuum in national leadership.

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The Amendment was ratified by the following states: *

Nebraska, July 12, 1965; Wisconsin, July 13, 1965; Oklahoma, July 16, 1965; Massachusetts, August 9, 1965; Pennsylvania, August 18, 1965; Kentucky, September 15, 1965; Arizona, September 22, 1965; Michigan, October 5, 1965; Indiana, October 20, 1965; California, October 21, 1965; Arkansas, November 4, 1965; New Jersey, November 29, 1965; Delaware, December 7, 1965; Utah, January 17, 1966; West Virginia, January 20, 1966; Maine, January 24, 1966; Rhode Island, January 28, 1966; New Mexico, February 3, 1966; Colorado, February 3, 1966; Kansas, February 8, 1966; Vermont, February 10, 1966; Alaska, February 18, 1966; Idaho, February 25, 1966; Hawaii, March 3, 1966; Virginia, March 8, 1966; Mississippi, March 10, 1966; New York, March 14, 1966; Maryland, March 23, 1966; Missouri, March 30, 1966; New Hampshire, June 13, 1966; Louisiana, July 5, 1966; Tennessee, January 12, 1967; Wyoming, January 25, 1967; Iowa, January 26, 1967; Washington, January 26, 1967; Oregon, February 2, 1967; Minnesota, February 10, 1967; Nevada, February 10, 1967.

* According to the official papers on file February 15, 1967, with the National Archives.

M E M O R A N D U M

September 24, 1973

TO: Hon. Birch Bayh
FROM: John D. Feerick
RE: Section 2 of the Twenty-Fifth Amendment

The purpose of this memorandum is to relate briefly the historical and legislative background of Section 2 of the Twenty-Fifth Amendment.

1. Historical.

When President Lyndon Johnson succeeded to the Presidency upon the death of President Kennedy, there resulted for the sixteenth time in American history a vacancy in the Vice Presidency. During the year and one-half that Johnson served without a Vice President, the Speaker of the House of Representatives and the President pro tempore of the Senate, respectively, were next in line to the Presidency, neither of whom was selected for his position with an eye to such succession. In recognition of the growing importance of the Vice Presidency in our government, there emerged a consensus that there was a need for a Vice President at all times and that the best way to handle the question of presidential succession was to settle upon a method of filling a vacancy in the Vice Presidency whenever it occurred.

As you will recall, during the development of the Twenty-Fifth Amendment, a number of proposals were advanced to fill a vacancy in the Vice Presidency. Among these were that the vacancy be filled by the electoral college--that Congress elect a Vice President subject to the President's veto--that there be a special election for Vice President--that the President submit a list of not less than three nor more than five names to either the House or the Senate; and that there be two vice presidents elected at election time.

The electoral college was rejected on grounds that it was too ministerial in nature, would be cumbersome, would involve delay, and would not command the respect and support of the people. A special election for Vice President was rejected because of concern about delay, the departure from our system of quadrennial presidential elections, and the possibility it might produce a Vice President not able to work effectively with the President. A selection by Congress was objected to on the grounds that if the President were from a minority party, Congress might select a Vice President from the other party; that even if the President had a veto over a congressional nominee he might be put in a politically embarrassing position or considered reckless by the people if he rejected that person; and that congressional selection might not give the President a person with whom he could work effectively.

The method contained in Section 2 of the Twenty-Fifth Amendment was embraced for a number of reasons. First, it would assure that the person nominated was a member of the President's own party, of compatible temperament and views, and someone with whom he could work effectively. It also would closely conform to the pre-election practice whereby the presidential candidate has a large say in the selection of his running mate. Second, confirmation by Congress would tend to create public confidence in the selection. The involvement of the Senate was considered desirable because of its historic "advise and consent" role with presidential appointments and because it is assigned a role in the selection of a Vice President under the Twelfth Amendment. The involvement of the House was felt desirable because its members would be close to the people and because it has a role in the presidential selection process under the Twelfth Amendment. The involvement of both houses, it was believed, was deemed appropriate for the selection of our nation's second highest officer since it would elevate his selection over other presidential appointments and more accurately reflect the wishes of the people than either House alone and achieve public confidence in the final choice.

2. Legislative.

The congressional debates and hearings in both Houses in 1964 and 1965 established a number of principles with respect to the meaning and intent of Section 2. These principles, and the pertinent legislative history, are set forth below.

As for the general intendment of Section 2, the following statements are in point.

By Senator Bayh:

"This requirement will accomplish two purposes. First, it will guarantee that there will be a Vice President, who will be able to work with the President. Second, it guarantees to the people that their representatives in Congress, those who are most responsive to the wishes of the people at any given time, will be able to express the voice of those whom they represent." (Cong. Rec. Senate, September 29, 1964, p. 22340)

".... It is the feeling, first of all, in the normal procedure of our convention process, the President does have a strong voice--not always the final voice--but a strong voice in choosing who his running mate may be. Certainly it is wise, and particularly in the time of crisis it is imperative, that we have a Vice President with whom the President can work. It would be worse, in my judgment, to have a Vice President who was looking for ways to embarrass the President than to have no Vice President at all. For this reason, we give the President the same authority that he now has as far as the Cabinet officials and others are concerned to nominate. Then, instead of his selection being confirmed only by the Senate, we bring in the Senate and the House--sort of a combination of the election procedure of the 12th amendment plus the advise-and-consent powers that the Senate now has. They would work together as two Houses sitting separately, but making the final determination to support or refuse to support the President.

"If they refuse to go along with his nominee, he certainly would bring up a second and perhaps a third or fourth." (1965 House Hearings, p. 89)

By Senator Ervin:

".... This method satisfies the requirement, voiced by President Truman, that the 'plan of succession be devised so that the office of President would be filled by an officer who holds his position as a result of the expression of the will of the voters of this country'; and by having the President nominate the candidate, it will insure his compatibility with the nominee. Also, the need for continuity is met. There will always be a Vice President who can participate in the creation and execution of the policies of the existing administration." (1965 Senate Hearings, p. 104)

By Senator Church:

".... So this proposal commences with a nomination made by the President himself to insure that any man finally selected would have the President's full confidence, that any man finally selected would be a member of the President's own party, and would have such rapport with the President as to be an effective Vice President and as to give continuity in the event that he should have to succeed to the Presidency itself." (1964 Senate Hearings, p. 81)

By Senator Moss:

".... If the President nominated the man to be the Vice President, the Congress, the entire Congress in this instance, would then consider his qualifications and I think the Congress naturally would give great deference to the choice of the Chief Executive. They would want to uphold his hand if he felt in all good conscience that that could be done. The chances are that he would nearly always be ratified. But there would be that check. These are the representatives of the people and if, after inquiring into it, they felt that there was any weakness or disability in this man, I am sure this person, this man or woman, would then ask the Congress, the Congress could then exercise its choice." (1964 Senate Hearings, p. 62)

By Representative Tenzer:

"Selection by the President of a nominee to fill vacancies in the Vice-Presidency would follow the traditional practice of nominating conventions. Confirmation by a majority of the Congress would tend to create public confidence in the selection." (Cong. Rec. House, April 13, 1965, p. 7689)

By Nicholas de B. Katzenbach:

"Permitting the President to choose the Vice President, subject to congressional approval, in the event of a vacancy in that office, will tend to insure the selection of an associate in whom the President has confidence, and with whom he can work in harmony. Participation by Congress in the procedure should help to insure that the person selected would be broadly acceptable to the people of the Nation." (1965 Senate Hearing, p. 11)

By Herbert Brownell:

"I think our Government has come to a position in modern times where it is almost essential for a President who wants to go down in history as a great President to have a Vice President who is able, public spirited, and an effective public servant, the job has become big. In each administration, more and more authority, power, and duties seem to be placed upon the Vice President, so that I think to counteract the points which you raised--and reasonably raised--you have a very strong self-interest on the part of the President to select the best possible man, and we must keep that in mind in weighing and trying to figure all the motives that would go into such a choice.

"We have what I think is the sensible protective measure in that Congress, in case an irresponsible nomination is made, can block it." (1965 House Hearings, p. 256)

By Clinton Rossiter:

"It is this final method, sir, which would join the three great political branches of our Government--President, Senate, and House--in a solemn and responsible act which strikes me as much the most sensible and convenient way to handle this delicate and vital problem.

"There would be, I think, a clear burden on the President to nominate a man of the highest stature and abilities. There would be a clear burden on the Congress to withhold its approval unless such a man were nominated, and to give its approval if such a man were nominated. Because the President disposes, we could expect the promise of continuity in the executive branch, and because Congress, as it were, disposes, we could assume the fact of legitimacy. We would have once again that doublecheck, that system of checks and balances, that has made our system so great and lasting." (1964 Senate Hearings, p. 218)

By Lewis F. Powell, Jr.:

"It is true that this procedure would give the President the power to choose his potential successor. But with the safeguard of congressional approval, it is believed that this is sound in theory and in substantial conformity with current nominating practice. It is desirable that the President and Vice President enjoy harmonious relations and mutual confidence. The importance of this compatibility is recognized in the modern practice of both major parties in according the presidential candidate the privilege of choosing his running mate subject to convention approval. In the proposed amendment, the President would choose his Vice President subject to congressional approval." (1964 Senate Hearings, pp. 93-94)

By Paul A. Freund:

".... The Vice Presidency should have a popular base and at the same time be in harmony with the Presidency. These objectives can best be achieved by associating the Congress and the President in the selection, with the opportunity for informal consultation to be expected in such a process." (1964 Senate Hearings, pp. 130-131)

The specific principles undergirding Section 2

are:

1. There should be both a President and Vice President at all times.

You stated in the Senate debates of February 19, 1965 that "we need provisions in the Constitution to enable the United States to have a Vice President at all times" (p.3171).

In the House debates of April 13, 1965, Representative Celler adopted and quoted your statement that

"Whatever tragedy may befall our national leaders, the Nation must continue in stability functioning to preserve the society in which freedom may prosper. The best way to insure this is to make certain that the Nation always has a Vice President as well as a President." (p.7690)

You made this statement at the outset of the January 22, 1964 hearings before the Subcommittee on Constitutional Amendments.

2. The President should have the power to nominate so as to assure that the Vice President will be a person who has his confidence, is of the same party, and is of compatible temperament and views.

During the Senate debates of February 19, 1965, you said that the method would provide a Vice President "with whom the President could work" (p. 3170). In the Senate hearings of that year you stated:

".... I would like to ask you a question on the need for the inclusion of the wording in your bill which says that he shall be a member of the same political party as the President. From the practical standpoint, I think that is what we want to accomplish." (1965 Senate Hearing, p. 45)

You stated in the Senate debates of September 28, 1964:

"The Vice-Presidential office under our system of government is tied very closely with the Presidency. The extent to which the President takes the Vice President into his confidence or shares with him the deliberations leading to executive decisions is largely determined by the President.

Another important reason for allowing the President to nominate a Vice President is that the close relationship between the President and Vice President will permit the person next in line to become familiar with the problems he will face should he be called on to assume the Presidency.

This close relationship between the President and the Vice-President is recognized by our political conventions, which allows the presidential nominee to choose his own running mate. This system has proved workable in our history.

Practical necessity would seem to require that the President be given a primary say as to who the Vice President will be." (p. 22993-94)

You further stated:

"By this means, it is virtually assured that the Vice President will continue to be a man in whom the President has full confidence and a man of the same political party and political philosophy." (p. 22994)

During the Senate debates of September 28, 1964, you also stated:

"In a time of crisis and turmoil, such as we experience with the loss of a President, we must give the new President the individual upon whom he can depend, the one who would cooperate with him and help him carry on the tremendous burden of the Presidency." (p. 22988)

3. Congress should have the role of confirming a President's nominee because it would know and be able to express the will of the people.

You stated in the Senate debates of February 19, 1965:

"Third, it would provide for a Vice President who would have received a vote of confidence and would have been, in fact, elected by the Members of both Houses who have the responsibility for being close to the people and knowing what they desire and expressing their wishes in Congress."
(Cong. Rec. Senate, February 19, 1965, p. 3170)

You also stated:

"...by combining both presidential and congressional action, we were doing two things. We were guaranteeing that the President would have a man with whom he could work. We were also guaranteeing to the people their right to make that decision." (Cong. Rec. Senate, February 19, 1965, p. 3173)

In the Senate debates of September 28, 1964 you stated:

"At the same time, congressional confirmation gives the people of the United States a voice through their elected representatives." (p. 22994)

You further stated:

"If Congress is to choose the man nominated, it will certainly consider this serious responsibility and act as the voice of the people. Whatever better opportunity is there for the people to express their wishes than through those who serve in Congress?" (p. 22996)

4. The confirmation process would be a deliberative one in which the nominee's qualifications for the Vice Presidency would be subject to scrutiny.

In the House debates of April 13, 1965,

Representative Rodino stated that

"The requirement of congressional confirmation is an added safeguard that only fully qualified persons of the highest character and National stature would ever be nominated by the President." (p. 7686)

In objecting to the Electoral College as a body to pass upon the President's nomination, you stated that the College is not chosen or equipped to exercise considered judgment or "conduct hearings on qualification of the nominee submitted by the President" (1964 Hearings, p.5). Senator Thurmond recognized and answered this objection in the Senate debates of February 19, 1965* (p.3191).

In an exchange with Senator Monroney at the Senate hearings of January 22, 1964, you stated with reference to the confirmation powers that they would be taken "even greater than is normally the case . . ." (p.39).

* This is the only reference that I have been able to locate specifically focusing on the question of hearings in the context of filling a vice presidential vacancy. See Appendix A for two law review articles which I did contemporaneously with the development of the amendment noting that such hearings would be appropriate and within the power of Congress. There were several references to the subject of hearings with respect to the situation where Congress had to decide an inability dispute between the President on the one hand and the Vice President and Cabinet on the other. See February 19, 1965 Senate Debates at 3195 (Pastore and Ervin), 3199 (Hruska); 1965 Senate Hearings at 21 (Hruska); 1965 House Hearings at 69 (Bayh), at 154-55 (Folsom). A point of contention was over whether the term "immediately" precluded such hearings.

You stated during the 1965 House hearings:

".... The President already has the power to nominate many executive offices and the Senate of the United States has the power to ratify, to confirm, to advise and consent or not to, and we are giving him the same power and bringing in the House of Representatives as the most populous and most representative power of the Congress. These shall have the final power of election after the President has nominated a Vice President." (1965 House Hearings, p. 92)

Senator Long said in the 1964 Senate hearings:

".... Confirmation by the Congress, under the proposed system for replacement of Vice Presidents, is a check and balance similar to those presently in our Constitution." (1964 Senate Hearings, p. 68)

Professor Kirby said in his testimony in the 1964 Senate hearings:

"However, a joint assembly of Congress has the same theoretical and symbolic values for our present purpose without the dangers of the electoral college. It is a numerical counterpart of the electoral college in which each State has the same representation through its congressional delegation as it has electoral votes. It is deliberative. It is easily assembled. It is responsible to the people. In all three of those respects it is in contrast to the electoral college." (1964 Senate Hearings, p. 42)

You also stated:

"... The specific point to which the Senator from Tennessee refers, I should like to point out, is very little different from the customary constitutional requirements of advise and consent which the Senate has had over Executive appointments." (Cong.Rec.Senate, February 19, 1965, p. 3193)

5. There would be a working relationship between the President and Congress in the selection of a Vice President.

That a working relationship between President and Congress was intended is indicated by the following.

Senator Ervin stated:

"... this resolution would allow the selection to be made when the vacancy actually occurs; and then conceivably, of course, the President and Congress together could select the best qualified man." (Cong. Rec. Senate, February 19, 1965, p. 3173)

Represented Hutchinson said:

"But under the provisions of Resolution 1, where he would send a name down and say, 'Take it,' he would still have to deal with the party leadership in Congress making sure that they would take it." (1965 House Hearings, p. 210)

As previously noted, Paul Freund said:

"... The Vice Presidency should have a popular base and at the same time be in harmony with the Presidency. These objectives can best be achieved by associating the Congress and the President in the selection, with the opportunity for informal consultation to be expected in such a process." (1964 Senate Hearings, pp. 130-131)

6. Partisan politics should be eliminated from the process.

The following statements by you are revealing on the question of partisan politics:

"I have more faith in the Congress acting in an emergency in the white heat of publicity, with the American people looking on. The last thing Congress would dare to do would be to become involved in a purely political move." (from Cong. Rec. Senate, February 19, 1965, p. 3193)

"... Our feeling is that in a time of national tragedy such as a death of a President where the Vice President succeeds, or where the Vice President himself dies--the country is in no mood to tolerate political chicanery in the appointment of a Vice President and I don't think this would be the case." (1965 House Hearings, p. 47).

You had this exchange with Clinton Rossiter:

Bayh - "Do you see this as an insurmountable problem? Might there be a Congress of a different party and would it want to play politics with the office and refuse to let, say, a Republican President select a Republican Vice President merely because a Democratic Congress was in power or vice versa?"

Mr. Rossiter - "Well, two points on that: I am assuming for this point that politics, petty politics would be pretty well laid aside but in addition remember that the onus then is placed on the Congress, they can confirm under the system that you and I have agreed on, the President's nomination, but they can't then reject and then put someone else in." (1964 Senate Hearings, p. 226)

In the Senate Debates of September 28, 1964, you stated that

"I believe that the Senator firmly agrees with me that at a time of national crisis the public would not tolerate the playing of politics in the choice of a Vice President." (p. 22988)

Also in that debate you said

"However, it was our thinking that the committee's proposal would lead to a more peaceful transition, a more peaceful choice, if the President were not put on the spot to select, as he would probably have to do, from among many names in order to choose up to five that he would submit to Congress. Under the committee's proposal, he would have to choose only one. This choice would become known. At a time of crisis, when a death or illness had occurred, turmoil might otherwise result. That was our reasoning." (p. 22999).

Senator Monroney made these observations in the same debate:

"We do not know what the situation will be 20, 30, or 40 years from now, or what great rivalry might exist between the two parties. I can think of nothing worse, looking into the future, and the dangers of that situation, than to have a newly succeeding Vice President to the Presidency send to Congress as his first act the name of the man who he believes is competent to be his successor, and having it tied up in a long confirmation fight, with the ultimate possibility of rejection; and with a rival party in the majority in both Houses, or even rivalry in the majority party, over the choice of the nominee, with perhaps leading Members in either House being anxious to come in the line of authority, and one or the other Houses refusing to confirm." (p. 22996)

7. There was no limit placed on the number of persons a president may nominate. The hearings and debates indicate that if a President's nominee is rejected, he has the right to nominate another person for the position.
-

As you testified before the House Judiciary Committee on February 9, 1965:

"There is no limit on the number of names the President could submit to the Congress. I think if we didn't pass on the first name, it would be logical for a second name to be submitted." (p. 50).

You further stated that "If the person is a namby-pamby person, the Congress wouldn't go along. He would have to send another name."

8. The Houses of Congress would vote separately on the nomination.
-

Representative Celler stated in the House debates of April 13, 1965 that

"There is no joint session. There is a separate vote of each body, and when the terminology is found in House Joint Resolution 1, it has been interpreted by the Supreme Court to mean a separate body. I refer to the case of Missouri Pacific Railway v. Kansas, 248 U.S., page 276." (p. 7675-76)

You stated at the hearings of January 29, 1965 before the Subcommittee on Constitutional Amendments that one of the reasons for the individual session formula was that a joint session would involve "a rather vigorous, time-consuming discussion on the establishment of rules" (p. 52).

At the House Judiciary Committee hearings of February 9, 1965 you stated that the confirmation would be by ". . . separate action by both Houses. There seems to be ample precedent whenever the wording is used in the Bill that it does mean separate sessions of each branch of the Legislature" (p. 45).

9. The required vote in each House would be a majority of those members present and voting, providing a quorum were present.

You stated at the House hearings of February 9, 1965 that the majority referred to is "a majority of the quorum which is necessary to conduct the business in the first place" (p. 60). This was covered by Attorney General Katzenbach at the same hearings when he said:

"What is meant is a majority...of those Members in each House present and voting, a quorum being present. This interpretation is consistent with long-standing precedent." (pp. 95-96)

This was reiterated again by the Attorney General later in his testimony (p. 101).

10. It was contemplated and assumed that the President would nominate and Congress would render its judgment within a reasonable period of time.*

In the Senate debates of February 19, 1965 you stated that you did not believe it was necessary "to grind everything to a halt to decide who the vice president is" (p. 3197).

At the House hearings you stated that the business would be "disposed of judiciously and quickly" (p. 65). You

* Your original proposal provided for the President to nominate within 30 days. The Senate rejected a proposal by Senator Bass that Congress be required to act "immediately." (Feb. 19, 1965, p. 3199)

also stated that both the President and Congress should use

"...their good judgment as to what would be reasonable. There would be some times, perhaps, when a name would be submitted for which there would be patent reasons for a tremendous amount of debate. Other times a name might be submitted and would be readily acceptable and there would be little reason for a prolonged debate and everyone would recognize this." (p. 66).

You had the following exchange with Herbert Brownell in the Senate hearings of 1965:

Bayh - "Would the same thing apply as far as Senator Miller's feeling that we need to specify that the appointment of the eventual successor to the office of Vice President must be a member of the political party of the President?"

Mr. Brownell - "I am sure of that; yes. I think the same thing would apply. I think that public opinion would not only demand quick action, but the commonsense of the Members of the Congress would make them realize that they could not perform their constitutional functions unless they had a strong executive branch prepared to meet all emergencies." (1965 Senate Hearing, p.64).

With respect to Congress "sitting still" on a President's nomination, Senator Ervin stated:

"God help this Nation if we ever get a House of Representatives or a Senate, which will wait for a President to die so someone whom they love more than their country will succeed to the Presidency." (p. 3199). *

During the House debates of April 13, 1965, Representative John Lindsay stated that "Congress must answer to the country if it does not speedily perform its job" (p. 7692).

* February 19, 1965 Senate Debates.

11. General Qualifications.

During the debates and hearings a great deal of concern was expressed over the possibility of the President using his appointing power to select a weak Vice President or a person inexperienced in national affairs, or a person who had never held public office.* The sponsors of the amendment argued that the President would be obliged to choose a person of national stature in view of the possibility of him having to succeed to the Presidency during the President's term.** As you stated in the debates of September 28, 1964:

"... I believe that this is a feeling shared by all of us, Republicans and Democrats alike--that the vice-presidential candidate should be the man best qualified to be President of the United States, should that unhappy day come.

I believe there is a general awareness on the part of all citizens of the country that this is the prime qualification that the vice-presidential candidate should have--the ability to fulfill the office of President if tragedy should strike." (p. 22987)

* April 13, 1965 House Debates at 7664 (Brown); 1965 House Hearings at 89-91 (Mathias), at 190 (Fuqua).

** February 19, 1965 Senate Debates at 3171 (Ervin), 3173-74 (Bayh); April 13, 1965 House Debates at 7686 (Rodino); 1965 Senate Hearings at 11 (Katzenbach); 1964 Senate Hearings at 19 (Ervin), at 63 (Moss).

12. Record Vote.

During the April 13, 1965 House Debates, Representative Celler made clear that the proposed amendment did not contain any provision for a record vote. He stated that "the right already exists to demand a record vote" (p. 7697).

13. Constitutional Qualification.

During the 1965 House Hearings you made clear that the nominee would have to be a natural born citizen of the United States, at least 35 years of age, and a resident within the United States for a minimum of 14 years (p. 48).

In the following two articles which I did contemporaneously with the development of the Twenty-Fifth Amendment, I observed that Congress would have the right to subject a President's nominee to such hearings.

In my article "Vice Presidential Succession: In Support of the Bayh-Celler Plan", 18 South Carolina Law Review, 226 (1966), I stated:

"It is unreasonable to assume that the United States Congress would not give careful consideration to the qualifications of a nominee for the Vice Presidency and, if it felt he were not qualified, to reject his nomination. In this connection, the proposed amendment provides that a nominee must obtain the votes of a majority of each House of Congress. Each House would meet and vote separately and could have such hearings and discussions regarding the nominee as it thought desirable. Accordingly, the presence of Congress under this amendment does guarantee an important role for the representatives of the people in the process of vice presidential succession."

Similarly, in a December, 1965 article in the Fordham Law Review entitled "The Proposed Twenty-Fifth Amendment to the Constitution", I stated:

"Before making a nomination, the President probably would seek the advice and views of the congressional leaders. His nominee might be asked to undergo hearings in the House and Senate. If the nomination were not confirmed, the President would nominate another Vice-President." (p.197)

APPENDIX A

